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THE LAW

OF

SPECIFIC RELIEF

IN INDIA.

BEING A COMMENTARY ON ACT I OF 1877.

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BY

CHARLES COLLETT,

LATE OF THE MADRAS CIVIL SERVICE; OF LINCOLN'S-INN, BARRISTER-AT-LAW; AND FORMERLY A JUDGE OF THE HIGH COURT AT MADRAS.

SECOND EDITION

BY H. N. MORISON,

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THE SPECIFIC RELIEF ACT, 1877.

PREFACE OF FIRST EDITION.

THE Specific Relief Act, 1877, embodies the equitable principles which have so long continued to govern the exercise of that remedial justice, once peculiar to the Court of Chancery, but now by recent legislation applicable by all courts alike in England. The leading maxims of the recent fusion of law and equity in England are, that where the rules of equity and of law conflict, those of equity are to prevail; and that every court once seised of a subject-matter of litigation, must use all means finally and fully to dispose of the same. This assimilation in principle to our courts in India, makes English decisions and practice more instructive than ever to legal practitioners in India. Further, the Specific Relief Act is pre-eminently an embodiment of English jurisprudence; its author was a practical English lawyer of eminence in his profession; he avowedly derived his materials from the jurisprudence in which he had been trained; and the numerous illustrations given in the Act may, with rare exceptions, be identified with actual cases recorded in the English equity reports. But, on the other hand, the principles codified in the Act being so entirely those of equity jurisprudence, must be regarded as of universal application, and such as should have been applied by our courts in India, though the Act had never been passed. Against this Act, at least, it cannot be charged that it imports, from a foreign source, a mass of legislation out of harmony with the wants and feelings of the people to whom it is to be applied. The Act does but codify those "rules of equity and good conscience" by which our courts in India are, and always have been, bound to govern themselves. Whether all the instances of rights, for which the Act provides remedies, have yet, in all parts of India, been developed and have found practical expression in actual life, may indeed be doubted; but that such rights must, in the course of the social progress of the people, be

developed, and that when and as they arise, the remedies provided in the Act are such as anyhow would have had to be applied, cannot, I think, be questioned. But though this Act is certainly drawn directly from English equity jurisprudence, yet it must be remembered that English equity is not the result of mere municipal legislation or of empirical justice ; it is a system which obtained its ingredients from various quarters, and was only gradually elaborated by means of numberless decisions ; but it has always answered the description of a body of legal principles claiming to override the fixed jurisprudence of the country on the strength of an intrinsic ethical superiority. In the historical development of law under the English system, as under every other system, equity has been an instrumentality for the adaptation of the law to social wants, and claiming to do so in virtue of a superior sanctity inherent in its principles. The equity, whether of the Roman Prætors, or of the English Chancellors, grounded its claim to authority, not on the prerogative of any external person or body, not even on that of the Magistrate who enunciated it, but on the special nature of its principles, to which it is alleged that all law ought to conform. (Maine's Ancient Law, 45, 28.)

Knowing then the source from which this Act was derived, it would seem to be mere perverse blindness to refuse to take advantage of the light which English equity cases must necessarily throw upon its provisions. Since our Codes in India have multiplied, there is, perhaps, a disposition to treat with disfavour the citation of English decisions. It is true that, in our courts in India, English cases are not authorities, in the full sense of the term ; but if the topic of law concerned is not one peculiar to India,—as Hindu or Mohammedan family law, or our varied systems of land law are, —but is one either of universal application, or derived from English jurisprudence,—as the law of contracts, of torts, or of equitable relief,—then, whether the same be more or less codified or not, it is absurd to decline to use for its elucidation the accumulated stores of wisdom to be found in English cases. Further, there is a practical difficulty in using the cases nowadays so copiously reported in India. The several High Courts in India are perfectly independent of each other, and are not accustomed to show that regard for

each other's decisions, which is the habit of courts of concurrent grade in England. One reason of this probably is that full-bench decisions are of rare occurrence, the several High Courts being divided into numerous Division Courts, as they are termed ; and the decisions of one Division Court are not conclusive as authorities upon another Division Court of the same High Court, and are wholly disregarded as such by the Division Courts of the other High Courts. Courts subordinate to the particular High Court are bound by the decision of a Division Court, but that is really the limit of its practical value as an authority. The decisions of the Privy Council are, of course, of absolute authority everywhere in India ; and all such cases I have been careful to cite in the following pages ; but though diligent advocates may cite such of the decisions of Division Courts as suit their purposes, it is impossible to say that they are either regarded, or can be relied upon as of any practical value as authorities. The High Courts themselves are in the habit, where the topic of law is one derived from English jurisprudence, of falling back upon reported English cases ; and very rightly so, as these really constitute the true sources of the law.

So much by way of apology for the free use I have made of English cases ; next as to the manner in which I have sought to use them. I am well aware that English cases may, apart from an adequate acquaintance with English procedure and real property law, be very misleading guides to practitioners in India. Writing, as I have done, not for the well-equipped few, but for the general body of practitioners and officials in India, whose libraries are limited, and whose acquaintance with systems of law other than their own is somewhat circumscribed, I have not attempted an exhaustive citation of cases, but have aimed rather at a sparing, though, I hope, adequate, selection. I have sought also to exclude all unnecessary details of the cases, and by eliminating mere specialities of English law, to adapt the principles established by them to the requirements of Indian practice.

Lastly, the Specific Relief Act being a codification of remedies rather than of rights, it contains in places what are mere allusions to the kinds of rights to which such remedies are applicable. The Act thus necessarily assumes, for its due application, a knowledge

of much equity law, which was not itself within the scope of the Act, and is not there treated in detail, but only incidentally alluded to; but an acquaintance with which is none the less essential in the practical working of the Act. Trusts, settlements, notice, family compromises, covenants annexed to land, the relation of promoters to companies, and awards, are some of the topics thus incidentally involved in the working of the Act. But such topics as these I have sought to treat in the following pages with adequate fulness, so that those for whose use I have more particularly prepared this commentary, may find in it all the information that is needed by them in cases coming within the operation of the Act. The chapters on receivers and injunctions contain the substance of a work published by me in 1861; but the whole of this has been re-written and re-arranged, and brought up to date by the addition of the latest cases. The present work should thus form, and it is hoped will be found to be, a compendium of as much equity jurisprudence, in relation both to rights as well as remedies, as is needed in ordinary practice, whether as an advocate or official, in India.

To law students in India, the book may, I trust, be found useful as an introduction to the general study of equity jurisprudence, with the advantage of showing how general principles of equity common to every system of administration have, by this Act, been made applicable to cases actually occurring in India. With this view I have, in preparing this work, endeavoured also to bear in mind the requirements of this class of readers.

In conclusion, I offer this work to the judicial service and the legal profession in India, fully conscious that I shall need their kind indulgence for many shortcomings in the performance of my task. I have learnt from such experience as I have already had as an author, how, especially in the first edition of a legal treatise, defects will be found despite the bestowal of much honest and painstaking labour; but I trust that the work may be accepted with indulgence as the result of such labour, and may aid in the increased operation of an Act which will, I think, as its provisions become better known and appreciated, receive a wide and beneficial application in ordinary practice in India.

October, 1882.

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SCHEDULE.

[ENACTMENTS REPEALED.]

Repealed.

THE

SPECIFIC RELIEF ACT,

1877.

An Act to define and amend the law relating to certain kinds of Specific Relief.

Preamble.

WHEREAS it is expedient to define and amend the law relating to certain kinds of specific relief obtainable in civil suits; It is hereby enacted as follows :—

PART I.

PRELIMINARY.

Different kinds of Specific Relief.

There are nine different kinds of specific relief provided by this Act, which are mainly, though not entirely, derived from the remedies peculiar to the equity jurisdiction of the English Courts; the relief by injunction belongs to preventive equity; while the rest may be described as belonging to executive and remedial or protective equity. It will thus be found that the cases I shall use as my authorities are almost entirely decisions of the English Equity Courts. Since the first edition of this work was brought out, however, a considerable number of important decisions bearing upon the Act have been reported, and reference is made to such of them as may prove of assistance by way of elucidation or illustration. Instances

of other kinds of specific relief not given by this Act will be found in Civil Procedure Code, 4th Schedule, forms of plaints, Nos. 105 to 110 and 113.

1. This Act may be called "The Specific Relief Act, 1877":

Short Title.

It extends to the whole of British India, except the Scheduled Districts as defined in Act No. XIV of 1874;

Commencement.

And it shall come into force on the first day of May 1877.

British India means the territories for the time being vested in Her Majesty by the Statute 21 & 22 Vic., cap. 106, (Act I of 1868, s. 2, cl. 8, as amended by Act XII of 1891).

Besides the Scheduled Districts defined in Act XIV of 1874 the Specific Relief Act has been extended by notification to the following districts, *viz.*:—The Scheduled Districts of the Punjab (*Gazette of India*, 22nd Sept. 1877, Pt. I, p. 562); the districts of Kamrup, Naugong, Darrang, Sibsagar, Lakhimpur, Goalpara (excluding the Eastern Dooars), Sylhet and Cachar (excluding the North Cachar Hills) (*ib.*, 10th Nov. 1877, Pt. I, p. 662); Hazaribagh, Lohardugga, Manbhoom, the Pargunnah of Dhalboom in the District of Singhboom (*ib.*, 16th Feb. 1878, Pt. I, p. 82); the Cantonment of Morar (*ib.*, 7th Sept. 1878, Pt. I, p. 559); the Jhansi Division (*ib.*, 26th Sept. 1879, Pt. I, p. 592); the Scheduled Districts of the Central Provinces (*ib.*, 13th Dec. 1879, Pt. I, p. 772); Sindh (*ib.*, 4th Dec. 1880, Pt. I, p. 676); Coorg (*ib.*, 3rd June 1882, Pt. I, p. 217); Western Jalpaigori (*ib.*, 10th Dec. 1882, Pt. I, p. 511).

Sections 2 and 9 of the Act have been extended to the taluqs of Bhadrachalam and Rakapilli and the Rampa country (*ib.*, 4th Oct. 1879, Pt. I, p. 630).

2. On and from that day the Acts specified in the schedule hereto annexed shall be repealed to the extent mentioned in its third column.

Repeal of enactments.

This section has been repealed by Act XII of 1891, Sch. I.

3. In this Act, unless there be something repugnant in the subject or context,—

Interpretation clause.

"Obligation." "Obligation" includes every duty enforceable by law:

The term "*obligation*" thus defined, is used in its proper juridical sense; it is the condition of being subject to a legal command, or liability to do or forbear something; and every legal command involves a corresponding legal duty; for command and duty are necessarily correlative terms. Hence every existence of a right in one person involves the existence of an obligation, either in some *one* else, or in *all* others, according as the right is a particular or a general one. Hence the duties enforceable under this Act may spring indifferently either out of tort or out of contract.

Obligation described.

It is essential to note this, because "obligation" in the terminology of English law is used in a very limited sense, as connoting only the duties created by, or springing out of, contract. (1 Austin's Jur. 7.)

"Trust." "Trust" includes every species of express, implied, or constructive fiduciary ownership:

"Trustee." "Trustee" includes every person holding, expressly, by implication, or constructively, a fiduciary character:

Illustrations.

(*a*) Z bequeaths land to A, "not doubting that he will pay thereout an annuity of Rs. 1,000 to B for his life." A accepts the bequest. A is a trustee, within the meaning of this Act, for B, to the extent of the annuity.

(*b*) A is the legal, medical, or spiritual adviser of B. By availing himself of his situation as such adviser, A gains some pecuniary advantage which might otherwise have accrued to B. A is a trustee for B, within the meaning of this Act, of such advantage.

(*c*) A, being B's banker, discloses for his own purpose the state of B's account. A is a trustee, within the meaning of this Act, for B, of the benefit gained by him by means of such disclosure.

(*d*) A, the mortgagee of certain leaseholds, renews the lease in his own name. A is a trustee, within the meaning of this Act, of the renewed lease, for those interested in the original lease.

(*e*) A, one of several partners, is employed to purchase goods for the firm. A, unknown to his co-partners, supplies them, at the market-price, with goods previously bought by himself when the price was lower, and thus makes a considerable profit. A is a trustee, for his co-partners, within the meaning of this Act, of the profit so made.

(*f*) A, the manager of B's indigo-factory, becomes agent for C, a vendor of indigo-seed, and receives, without B's assent, commission on the seed purchased from C for the factory. A is a trustee, within the meaning of this Act, for B, of the commission so received.

(*g*) A buys certain land with notice that B has already contracted to buy it. A is a trustee, within the meaning of this Act, for B, of the land so bought.

(*h*) A buys land from B, having notice that C is in occupation of the land. A omits to make an inquiry as to the nature of C's interest therein. A is a trustee within the meaning of this Act, for C, to the extent of that interest.

Trusts, kinds of.

These definitions of "*trusts*" and "*trustee*" divide trusts into three classes, viz., *express*, *implied* and *constructive*. As to an *express* trust, there is no difficulty; it is where a person creates a trust, *eo nomine*, in the terms and form of a trust. An *implied* trust is also the creation of the party, not indeed directly declared, but so that the court can and will, by implication, sufficiently ascertain it. Illustration (*a*) to s. 3 is a common instance of an implied trust. A *constructive* trust is purely the creation of the law; it arises by operation of law, without regard, or in opposition, to any intention of the party. Illustrations (*b*) to (*h*) are all instances (more or less distinct) of constructive trusts.

Resulting trusts.

In English works on Equity will be found also a large class of trusts called *resulting* trusts. Where A transfers property in trust for purposes which partly or wholly fail, or do not exhaust the property, or where A transfers or purchases property in the name of B, without any declaration of purpose, there is said to be a *resulting* trust as to such surplus or property in favour of A or his representatives.

A *resulting* trust is, therefore, one ascertained by the court, but in accordance with the presumed or implied, though wholly undeclared, intention of the party. It is, I think, more accurate to classify resulting trusts with *implied*, and not with *constructive* trusts, as is done in some books; since the question whether the beneficial interest is to

result back, or is to remain with the grantee, is always a struggle to arrive at the true intent of the grantor.[1]

Legal and equitable estates.

Further, it should be noticed that, by the definition, a trust on its creation, in either of the three ways, transfers "ownership;" this is "fiduciary" indeed, but still it is ownership; and, therefore, the condition of the legal and equitable estates in the same subject-matter of property being severed, and they being respectively vested in two different persons, with all the consequences thereof, is here distinctly recognised. The old Roman law and the common law in England in vain struggled for ages to prevent the equitable estate from being severed from the legal estate; but no civilised community can long do without recognising the possibility of such severance. It is obvious that property, whether moveable or immoveable, must for many purposes be vested, more or less absolutely, in some person or persons for the benefit of other persons, and trusts of various kinds have been recognised and acted on in India in many cases (*Tagore* v. *Tagore*, Ind. Ap. Sup. Vol. 47). Trusts, in the strict sense in which that term is used by English lawyers, that is to say, confidences to the existence of which a 'legal' and an 'equitable' estate are necessary, are unknown to Hindu and Muhammadan law. But trusts, in the wider sense of the word, that is to say, obligations annexed to the ownership of property, which arise out of a confidence reposed in and accepted by the owner for the benefit of another, are constantly created by the natives of India, and are frequently enforced by our courts. "There is probably," says Mr. Justice Phear (4 B. L. R. O. C. J., 134), "no country

[1] In Act II of 1882 (which territorially applies to the Presidency of Madras, the North-Western Provinces, the Punjab, Oudh, the Central Provinces, Coorg, and Assam, and which the Local Government may, from time to time, by notification in the official Gazette, extend to any other part of British India) resulting trusts are, in ch. iv, classed along with constructive trusts as *quasi*-trusts or "obligations in the nature of trusts."

As to constructive trusts, at least, this classification is at variance with that adopted by the Specific Relief Act, and as to resulting trusts I prefer, for the reasons given at length, to classify them, not as *quasi*-trusts, but as a subdivision of implied trusts. Though Act II of 1882 is only in force in the above specified portions of British India, being founded upon the Equity Law as administered by the Courts in England, it may be taken to contain a statement of the Law of Trusts administered throughout the whole of British India (Statement of the object and reasons of the Indian Trusts Bill. *Gazette of India*, November 13th, 1880.)

in the world where fiduciary relations exhibit themselves so extensively, and in such varied forms as in India, and possession of dominion over property, coupled with the obligation to use it, either wholly or partially, for the benefit of others than the possessor, is, I imagine, familiar to every Hindu." So, too, in the case of Muhammadans, when a woman is entitled to a share of her deceased father's estate in the hands of her brother (W. R., 1864, p. 377), or to exigible dower in the hands of her husband (6 W. R. 111; Statement of Objects and Reasons of the Indian Trusts Bill, *Gazette of India*, Nov. 13th, 1880).

Classification of trusts.

There is no very settled classification of trusts, either in English cases or treatises. I prefer to follow Lewin on Trusts in classing such a case as Illustration (*a*) as an implied, and not an express trust. In ch. vii, note (1), p. 140, he puts the precise case as an instance of an implied trust. Spence, in vol. 2, p. 64, note (*b*), classes it as an express trust, giving reasons, which appear to me unsatisfactory, for differing from Lewin. Story, in 2 Eq., s. 1068, places such cases among express trusts, but inaccurately speaks of them as "implied or constructive." Other treatise writers have classed some of the cases falling under the leading case of *Harding* v. *Glyn* (2 L. C. in Eq., 5th ed., 962), as express, and some as implied trusts. In the early history of trusts under the old Roman law, the form of words used was one of request, hope, or expectation, but this was merely because there was for a long time no protection for any trusts, and no capacity, therefore, to direct or command. But trusts are now recognised methods for governing the enjoyment or devolution of property; and, taking the ordinary distinction between the words "express" and "implied," I think it is the reasonable conclusion that the present Act intended to use the words in their ordinary sense, and that Lewin's classification is in accordance therewith. The cases, of which Illustration (*a*) is an example, contain a great variety of forms of expression, all falling far short of a distinct and clear direction or command, and, therefore, falling short, as I think, of an express trust. In such cases it is always a question, from a consideration of the directory words, of the subject-matter, and of the object, whether it was the intention of the grantor to create a trust or not (see *Stead* v. *Mellor*, 5 Ch. D. 225). I agree, however, that resulting trusts of all kinds are to be classed as implied trusts, and that they are in no sense a branch of constructive trusts, as Lewin puts them; and that implied trusts

and constructive trusts ought not to be, as they frequently are, confounded together; for a constructive trust is always raised by construction of equity fastening upon the conscience of the party, in order to satisfy the demands of justice, without reference to any presumable intention.

I do not know that, in considering this Act, much turns on the classification of trusts; but it may help to clearness of view, if I state briefly the classes of trusts and their subdivisions, as specified in s. 3.

I. *Express Trusts* are where there are explicit commands and directions leaving no question of the intention of the grantor to create a trust; and the only questions left are upon the proper construction of the terms used in the instrument creating the trust. This class admits of two subdivisions:

Express trusts.

(1.) Executed trusts; that is, where the grantor has been his own conveyancer, and has expressed for himself the limitations of the interests he grants;

(2.) Executory trusts; that is, where the grantor's directions are designedly left by way of heads or instructions to the trustee for hereafter, by a further instrument, limiting and conveying the beneficial interests intended to be granted. Each of these subdivisions may be again divided into where the trust is created (*a*) by will or bequest, and (*b*) by settlement or instrument *inter vivos*.

Implied trusts.

II. *Implied Trusts.* This class admits of three subdivisions.

(1.) Where the terms not being explicit, but expressions of recommendation, confidence, hope, wish, or desire, more or less indistinct, the question is whether, under all the circumstances, it was the intention of the grantor to create any, and if so, what trusts on behalf of others.

(2.) Where, out of the property conveyed for trust purposes, there is, from any cause, a surplus as to which, in the absence of directions, the question is whether, in the circumstances, the grantor intended there to be a resulting trust thereof for himself or his representatives, or whether the grantee is to take the beneficial interest. In India

[1] The mere classification of juridical rights and relations is not (I humbly conceive) to the practitioner, worth wrangling about; to him it is useful only so far as it subserves to clearness.

a Hindu widow, under the Mitakshara law, has simply an estate for life in her husband's estate, and when she invests the accumulations from her deceased husband's estate, *primâ facie* it is her intention that they should be regarded as accretions thereto, and not as a separate estate descendible in a different line of succession (*Babu Sheo Lochun Singh* v. *Babu Saheb Singh*, 14 Ind. Ap. 63.)

(3.) Where one person conveys, without consideration, property to another, or takes a conveyance in the name of another, himself being the real purchaser, and in the absence of directions, the question is whether such person was intended to be a mere trustee, so that there is a resulting trust for the grantor or his representatives, or whether the grantee is to take the beneficial interest.

III. *Constructive Trusts.* The kinds of cases falling within this class are as various as the kinds of frauds which the court seeks to defeat by the construction of a trust.

Constructive trusts.

Such is a classification of trusts generally; to comment on them all would be to write a treatise on the principal topic in equity jurisprudence. The question for our consideration is what kinds of specific relief as provided in this Act are applicable to the enforcement or protection of the beneficial interests or rights derived from the creation of trusts, either express, implied, or constructive. These will have to be sought for in different parts of the Act. In s. 10 and s. 11 there are very limited references to trusts and trustees. By s. 30 the remedies provided in ch. ii. are made applicable to a limited subdivision of class I., namely, to executory express trusts by will. There remains the provision for the enforcement of trusts in s. 12, clause (*a*). How far then is this general provision applicable?

Specific relief as to trusts.

The definitions of a trust in s. 3, and in English equity treatises differ in form. In the latter a trust is generally described as the *beneficial* right, title, or interest in property, real or personal, distinct from the apparent or legal ownership; and the legal is said to follow the trust estate as the shadow does the substance. (2 Story's Eq. 964; 2 Spence's Eq. 875.) In s. 3 the definition is just the converse of this; it is true that both definitions signify the same notion, but each denotes what the other only connotes. But the difference seems designed; in s. 3 it is the *fiduciary* aspect of the ownership, and the *fiduciary* character with which a trustee is clothed, to which prominence

has been designedly given. In this view it approximates to, if it does not coincide with, the definition of trust in the Indian Trust Act of 1882; though there it is not at all the estate or ownership, whether it may be merely apparent on the one side, or beneficially complete on the other, that is described or defined, but the duty or obligation annexed to apparent ownership.

Specific performance of trusts.

Section 12, and, indeed, the whole of ch. ii., assumes the existence of a contract, and the specific relief provided therein applies only in cases of contract. Clause (*a*) of s. 12 provides that specific performance may be enforced "when the act *agreed* to be done is in the performance, wholly or partly, of a trust," and then an illustration is given which is very significant from its vagueness, as it says nothing as to how the trust was constituted, but merely that A is a trustee for B.[1]

The act, therefore, *agreed* to be done by A, must be taken to be to hold the stock for the use and benefit of B. A sells the stock, and the court then decrees against A the specific performance of his contract to hold the stock in trust for B, by requiring him to restore the same quantity of stock. But if A was a bare trustee for B, it may be said, Where was the contract on his part within the definition of "contract" in the Indian Contract Act? The reply is, that in consideration of the grantor transferring to A the fiduciary ownership of the stock, A agreed to hold the same for the benefit of B, and so a valid contract was constituted. The law of bailments will illustrate this; where the bailment is gratuitous on the part of the bailee, as in deposit and mandate, his promise is not supported by a legal consideration, and its performance is, therefore, not enforceable so long as nothing has been done; but if the bailee once enters upon the trust, and takes the goods into his possession, then he will be liable for any damage from the ill performance of his contract; the confidence inducing another to trust him with his goods is a sufficient legal consideration to support an action for a breach of duty. (*Coggs* v. *Bernard*, 1 Sm. L.C. 199; Story on Bail, ss. 164 to 171.) As to

[1] So far as Act II. of 1882 extends, the Illustration (*a*) to s. 12 is repealed, but in s. 23, Illustration (*g*), of that Act, we have an example of the specific relief available in a like case. The case in Illustration (*a*) of s. 12, is indeed an example of specific relief on the breach of a trust rather than of a direct specific performance of a trust; but the distinction is immaterial.

permitting the beneficiary, who may be a stranger to the consideration for such a contract, to sue to enforce its specific performance, it must be borne in mind that, in courts like ours in India, which are courts of equity and good conscience as well as of law, it is immaterial to discuss how far there is a consideration moving from the beneficiary; for overriding all such discussion, is the equitable principle, the ground of decision in numberless cases, that a man who has accepted the possession of property for the express benefit of another, shall not be allowed to retain the property discharged of the obligation, but may be compelled at the suit of that other to the specific performance of his undertaking (see 1 Story's Eq., ss. 64, 256, 439, and 781; 2 Spence's Eq., p. 275, *et seq.*).

So if we take Illustration (*a*) to s. 3; here also, as A accepts the bequest from Z, A has agreed, in consideration of the bequest to himself, to hold the fund to the extent of the annuity for the benefit of B, and so a valid contract has been constituted which B may specifically enforce. It would be the same if A took no personal benefit under the bequest; for if he assents to be clothed with the fiduciary ownership of the fund, he agrees, in consideration thereof, to hold the fund for the benefit of B.[1]

Whenever, therefore, from the nature of the trust, the trustee must be taken to have agreed to hold the property upon the trusts expressly or impliedly created, the specific relief applicable will fall within ch. ii, by decreeing against him the specific performance of his contract or undertaking. (For the like provision in Act II of 1882, see s. 56.) This may seem clear as to express and implied trusts, but not equally so as to constructive trusts; but when, in certain circumstances, A is declared by the law to be a trustee for B in respect to particular property, he is thereby clothed with the same juridical relation to B, and is compellable to perform all the duties of that relation, in the same manner as if he had voluntarily assumed the relation. (See Act II of 1882, s. 95.) Further, in such cases,

[1] It may be convenient here to notice that the Illustrations given in our various Indian Codes have been described by the Legislature, as "not merely examples of the law in operation, but the law itself, showing by examples what it is;" they are decisions by the Legislature, "settling points which, without them, would have been left to be determined by the Judges; yet they are strictly confined to the function of guiding the Judges in their future decisions, and of explaining in what manner the definitions and rules to which they are annexed are to be interpreted and applied."

such a form of specific relief as the rescission of an agreement, or the cancellation of an instrument, the appointment of a receiver, or the restrictive remedy of an injunction, may be the one appropriate to the exigencies of the case; for the arrangement of this Act is necessarily according to the kinds of specific relief to be given, and not according to the kinds of rights entitled to specific relief. (See Act II of 1882, s. 60, Illustration (*a*); and s. 61, Illustration (*b*).

Relief in implied trusts.

It will be convenient here to treat of those kinds of trusts instances of which are given in the Illustrations to this section. Illustration (*a*) is an instance of that class of implied trusts of which *Harding* v. *Glyn* (2 L. C. in Eq. 962) is the leading case. This was a case in which a husband gave certain property to his wife, but "did desire her," at her death, to dispose of the same to "such of his own relations as she should think most deserving and approve of:" and it was held that the wife was a trustee, and as she failed to dispose of all the property in the manner directed, it was equally divided among the husband's relations at her death. To create a trust of this kind three requisites must co-exist; (1) the words used, however varied, must be such as, upon the whole, ought to be construed as imperative; (2) the subject of the implied trust must be certain; and (3) the object must also be certain. (See the like rule laid down in Act II of 1882, s. 6.) In the absence of express terms the court is seeking to gather whether it was the intention to create a trust; and a failure in one or more of the above requisites is either a ground for arguing that there was no such intention, or makes it impossible to ascertain the intention. (1) As to the words: a great variety of words have been used, as "hope," "request," "wish," "assurance," &c.; the words "not doubting" were used in one case. (*Parsons* v. *Baker*, 18 Ves. 476). The question is always one of construction; is all discretion taken away from the legatee? do other words, such as "free and unfettered," prevent the words of hope or request being imperative? may the legatee apply part of the subject to his own use? These are the kind of questions that occur in construing the words used. (See *McCormick* v. *Grogan*, L. R. 4 H. L. 82.) The words "it is my desire that she allows" were held not to create a trust. The courts are opposed to extending the old

Essentials of an implied trust.

The words.

The subject-matter.

cases in any way or to relying upon the mere use of particular words. It is to the true effect of the words and the intention of the testator that the courts look. (*In re Diggles*, 39 Ch. D. 253). (2) The certainty of the subject-matter. If no particular property can be pointed to as given in trust; as if the legatee is merely desired to "remember," "consider," or "do justice" to certain persons, so that it is impossible to say what sum, more or less, is to be bestowed with this view, then no trust can be implied. (*Cole* v. *Hawes*, 4 Ch. D. 238.) So if the legatee has discretion to use the property as he likes, and the bequest is as to what is "left" or "what remains," so that the legatee may leave nothing or anything as he fancies, the subject is too uncertain to raise a trust. (*Parnall* v. *Parnall*, 9 Ch. D. 96.) In *Mussoorie Bank* v. *Raynor* (7 Ap. Cas. 381; L. R. 9 Ind. Ap. 70) it was held that such words as "when no longer required by her" are equally as uncertain as "what is left;" for there is no telling how much the legatee may require. Uncertainty as to the subject-matter has a reflex action upon the precatory words used, and adds to the difficulty of taking them as imperative. The context must, of course, be looked to in deciding whether there is a want of certainty.

The object.

(3) The certainty as to the object of the trust. A devise of property with a hope that it may be continued "in the family," seems now upon the cases to be too uncertain to raise a trust. (*In re Hutchinson & Tenant*, 8 Ch. D. 540; see Act II of 1882, s. 6, Illustrations (*b*) and (*c*)). Where general words, such as "heirs," or "near relations," are used, there should be certainty as to when they are to be ascertained, whether at the death of the donor or donee. But if the object is ascertained, and the subject is certain and limited to his benefit, though the widest discretion may be left to the trustee in its application for that purpose the trustee can take no personal benefit, but is bound to apply or to account for the whole of the property. (*Wainford* v. *Heyl*, L. R. 20 Eq. 321.) So where a husband designates their children as the objects for whose benefit his wife is ultimately to exercise her discretion, the result is to give her a life interest with a power to appoint among the children as she thinks fit. (*Curmick* v. *Tucker*, L. R. 17 Eq. 320; *Le Marchant* v *Le Marchant*, L. R. 18 Eq. 414.)

The tendency of late years has been rather against the creation of these implied trusts, that is, to insist rather rigidly on the co-existence of the three requisites, and to limit the creation of trusts

by precatory words. (*In re Adams and the Kensington Vestry*, 27 Ch. D. 394, 410; *In re Diggles*, 39 Ch. D. 253.) In one case where there was a devise of certain estates with a hope that A would be continued as agent and manager thereof, it was sought to turn this into a trust on behalf of A, but it was held that this would be to change an agent, liable to dismissal at pleasure, into an incumbrancer, entitled to a fixed salary or percentage. (*Shaw* v. *Lawless*, 5 C. & F. 129; *Foster* v. *Elsley*, 19 Ch. D. 518.) Lastly, clear words of gift to a devisee for his own benefit free from control, will not be cut down by subsequent words, which may operate as an expression of desire, without disturbing the previous devise.

Condition and trust distinguished.

I may here, in passing, distinguish between a transfer of property by A to B *in trust* to do certain things, and a transfer *on condition* of doing certain things. In the latter case, the doing of the act, as the paying a sum of money to a third person, is a condition precedent to the vesting of the property in B, and thus creates no obligation as between B and such third person to do the act: but in the former, the doing of the act is not to be a fact precedent to the vesting, but it is the intended consequence of the vesting, and the fact of the vesting, therefore, gives rise to the obligation towards the third person to do the act, and entitles him to enforce it. In Act II of 1882, s. 6, Illustration (*e*) is, "A bequeaths a shop and stock-in-trade to B, on condition that he pays A's debts and a legacy to C. This is a condition, not a trust for A's creditors and C."

But it may be that the property itself becomes subject to the condition, so that the refusal of the devisee to perform the condition shall not disappoint the person intended to have the benefit of the condition; and in this view the property, though not the person, is charged with the trust for the benefit of the person named in the condition. Thus in *Wigg* v. *Wigg* (1 Atk. 383) it was laid down that "if A devises land to B on condition to pay C a sum of money, and no clause of entry; this is no charge on the estate to give the legatee of the money a lien on the lands, but the heir at law shall enter and take advantage of the breach of the condition, and yet in this court he shall be considered as a trustee for the legatee." In other words, the heir will be bound, if the court can see that the real intention of the testator was to create a trust. This was followed in *Kirk* v. *Kirk* (21 Ch. D 431) where the cases cited at p. 14 were not mentioned.

There, A devised land to B, his son, on condition of remitting a debt due by A to B. B died before A, but it was held, in favour of those interested in the personal estate, that the debt due to B's personal representative must be raised out of the estate devised.

In the case of *Wright* v. *Wilkins* (2 Best & Sm. 232) it was due entirely to subsequent words qualifying the condition, that it was held that it did not create a condition for breach of which the heir might enter, but a trust which the defendant, taking the legal estate would in equity be bound to perform. Cases of this kind must be distinguished from cases in which there is a devise on such a condition as to keep the house in repair, not to commit waste, and so on. In such, the condition is merely a limitation or qualification of the interest transferred. (See *Kingham* v. *Lee*, 15 Sim. 396.)

Resulting trust in an implied trust.

Where property is given subject to a trust to be implied from words of recommendation, and this trust fails wholly or in part, the legatee will take the benefit, and there will generally be no resulting trust for the grantor or his representatives. But if it is apparent on the whole that the intention was, not that the legatee should take the beneficial interest subject to or charged with the implied trust, but merely that he should be a bare trustee conveying the beneficial interest to others, then, if the trust fails wholly or in part, there will be, in this, as in every other kind of trust, a resulting trust for the grantor or his representatives. (*Wood* v. *Cox*, 2 My. & Cr. 684; *Briggs* v. *Penny*, 3 Mac. & G. 546.)

Trusts by way of power.

There may be a direct trust of this kind in favour of a particular person as in Illustration (*a*), or the trust may be in the form of a power to select particular individuals out of a general class, as in *Harding* v. *Glyn*, and *Mussoorie Bank* v. *Raynor*, L. R. 9 Ind. Ap. 70. Then it has to be seen whether the donee of the power has a duty cast upon him to execute the power, that is, whether a trust has been coupled with the power. To give a person a bare power or capacity to do a thing is to leave it to him to do it or not as he likes; but it may be so given that he is entrusted with a duty which he is bound to execute, and if he fails, the objects of the power ought not to suffer; and as equality is equity, the court will then execute the trust by an equal division among the objects of the power. In *Crawford* v. *Forshaw* (43 Ch. D. 643) a testator appointed three executors to his will. He

then gave the residue of his estate to certain charitable institutions, or, "others, as my executors herein named may select, to be divided in such proportions as they may approve of." Two of the executors proved the will, whilst the third renounced probate. It was held, nevertheless, that the third executor was entitled to take part in the selection of the charities, and in the disposition amongst them. It will not, perhaps, be useful to go further into the niceties of powers in English law.

The introduction of Illustration (*a*) is of very great importance, as it shows the recognition by the Legislature of this class of trusts created by words falling very far short of the expression of a clear intention, and admitting of great variance (as decided cases show), in the degree of hope, or wish, or purpose indicated. Perhaps it is well upon the whole that such a mode of creating trusts should be recognised; but it has given rise from the earliest times to much nicety of distinction between the varying forms of words used by testators. Some writers and Judges have gone so far as to say that, as the difference between words of positive command and words of recommendation, confidence, or hope, is a very clear one known to every one, it is a pity that words precatory in their nature should ever have had given them greater force than that of mere moral suggestions. Certainly great caution is needed not unduly to extend the doctrine of recommendatory trusts (2 Story Eq. 1069—1074; *Knight* v. *Knight*, 3 Beav. 172).

Policy of implied trusts.

I pass now to another kind of implied trusts, namely, resulting trusts, which are of two kinds. Where property is given upon trust (either expressly or impliedly) and the trusts fail wholly or in part,—from the failure of the objects, or from the nature of the trusts, as being illegal or indefinite,—or the trusts when fully executed do not exhaust the property applicable to them, there is said to be a resulting trust of such property, or unexhausted portion thereof, in favour of the grantor or his representative, that is, the grantee becomes a trustee thereof for him. Now this is clearly an implied trust, for it is inferred from a consideration of the terms and purposes of the grant or bequest, that, in the events which have occurred, the grantor, though he has not said so, must have intended that the property should come back to himself or his representative. If he has said so, there is, of course, no difficulty; but the question is, when shall such a resulting trust be implied, and when

Resulting trusts.

shall the grantee be taken to have been intended to have the benefit of the failure of any of the trusts in favour of other objects? This question can scarcely arise except when the grantee is obviously intended to have some beneficial interest under the grant or devise. In such case, if the trust that fails was intended to be an *exception* out of the gift to the grantee or devisee, a resulting trust is implied; but if it was intended to be a mere *charge* upon the property granted, or, in other words, where there is an absolute gift with an ineffectual or partial trust, or a void condition, then the benefit of the lapse or failure remains in the donee. Thus a grant or devise to A, subject to a charge or condition that he shall pay out of it £100 to B if he attains 21, then if B dies under 21, clearly A has the benefit. (*Cooke* v. *Stationers' Co.*, 3 My. & K. 264; see also Act II of 1882, s. 83.)

Where the devolution of property on intestacy varies according as it is real or personal, nice questions as to who takes the benefit of the resulting trust may arise between the heir and next-of-kin. As to such it will suffice to refer to the leading case of *Ackroyd* v. *Smithson* (1 L. C. in Eq. 949); they are not likely often to arise for decision in India.

Resulting trusts on sale, &c.

The next class of resulting trusts is where there is a transfer or purchase in the name of a third person, without consideration, and without any declaration of trust, and the question is whether such third person is to have the benefit, or was intended only to hold as trustee for the real owner.

In the case of such a conveyance, or of a devise by will (as to A "upon trust" without more), to a third person, generally it will be presumed that such person is to hold only as trustee; but the real intention is to be gathered from a consideration of the expressions used in the instruments itself, from any attendant circumstances as to which oral evidence may be admissible, or from any such patent fact as the relationship of the parties, as where the grantee is the child, wife or other near relation of the grantor, so that an intention of benefit may be fairly inferred. (2 Spence's Eq. 225; 2 Story's Eq. 1197; Act II of 1882, s. 81.)

***Benamee* purchases.**

The more frequent case is where there is a purchase by A who pays the money, and a conveyance in the name of B. In this class *Dyer* v. *Dyer* (1 L. C. in Eq. 223) is the leading case; there also it is a question of intention

to be decided upon the evidence. If B is a stranger, a resulting trust for A, the real purchaser, is presumed. So where two or more advance the purchase-money jointly, and the conveyance is in the name of one, the latter is a trustee as to the shares of the others. Of course if A has merely lent the purchase-money, no trust arises; and none can be implied where the *benamee* conveyance is in evasion of the policy of some enactment. It seems now settled that though the consideration is expressed to have been paid by B, oral evidence is admissible to prove that A really paid it; but it may reasonably be required to be clear evidence. On the other hand, like evidence is admissible to rebut the resulting trust, and to establish a real intention of benefit on the part of A towards B.

In India, the rule is well established that in all cases of *benamee* transactions, the true criterion is to ascertain from whose funds the purchase-money proceeded. Whether the nominal owner be a child or a stranger, a purchase made with the money of another is, *primâ facie*, assumed to be made for the benefit of that other (Mayne's Hindu Law, ch. xiii).

Where B is not a stranger, but is a child or other person to whom A stands in the place of a parent, or where B is the wife or other near relation of A, the reasonable inference from A's taking the conveyance in the name of B, is that he intended to benefit B; instead of a resulting trust being presumed, there must be clear evidence that such was intended; and minor circumstances are not sufficient to rely upon;—thus that the conveyance was in the joint names of the father and son, or that there were some reasons for such a joint conveyance, or that the father had already done more or less for the advancement of the son, or that he alone used to receive the rents or dividends from the property, are not deemed sufficient to rebut the intention of benefit. Facts to prove a resulting trust must, in such a case, have been antecedent to, or contemporaneous with, the purchase, or so immediately after it as to be part of the transaction; but merely subsequent facts, or subsequent acts and declarations of the father, are not admissible evidence; they are to support the presumption of benefit to the son, but not to rebut it. So the presumption cannot be rebutted by offering to show that the real intention was that the deed should operate in fraud of the law. (*Dyer* v. *Dyer*, 1 L. C. in Eq. 223; Lewin on Trusts, 199—216; Act II of 1882, s. 82.) In the case of a joint Hindu family there is always a presumption in favour of all

property being joint, which the mere fact of a purchase in the name of any one member does not rebut (6 Moore's Ind. Ap. 53; 3 Moore's Ind. Ap. 240).

No illustrations are given of resulting trusts, but they are clearly to be included in implied trusts, andare kinds of trusts not unlikely to arise for decision in India; *benamee* conveyances as they are called in India are common enough, and in every such case the question will occur, whether or not a resulting trust ought to be presumed, and if so, the appropriate relief would be under this Act by decreeing the specific performance of such trust.

Constructive trusts.

I pass now to the third great class of trusts,—namely, constructive trusts, where the law creates the trust without regard, or rather in direct opposition, to any intention of the party charged with the trust. This is so when the transaction out of which the trust is raised is tainted either with actual fraud, or with what is called constructive fraud, that is, something that either virtually defrauds another individual, or, if generally permissible, would lead to frauds, though on the side of the party chargeable, there may have been no selfish or evil design, or nothing more than what he deemed justifiable or allowable. It will be convenient to take in their order the Illustrations (*b*) to (*h*) of s. 3, which contain examples of constructive trusts raised by law. (See Act II of 1882, s. 84 to s. 90; the Act applies only to a limited portion of India, see note, *ante*, p. 5).

Cases of undue influence.

Illustration (*b*).—This is an example of that class of case in which "undue influence"[1] arising out of the relation between the parties has resulted in one party gaining an advantage from the other, and either because of the virtual fraud in the particular case, or because such a transaction, if generally permissible, would be against the public welfare, as leading to the perpetuation of wrongs, the law refuses to allow the party to retain the advantage (1 Story's Eq. 258). *Huguenin* v. *Baseley* (2 L. C. in Eq. 547) is the leading case in this class of cases, in which, upon the principle of general public policy, voluntary donations obtained by persons standing in some peculiar confidential or fiduciary relation towards the donor have been set aside The jurisdiction is not limited to the three kinds of relation mentioned

[1] A phrase defined in s. 16, Indian Contract Act, but not used in this Act.

in the Illustration, but applies also where the relation is that of parent and child, guardian and ward, trustee and beneficiary, or indeed wherever a confidential relation of any kind, giving an opening for undue influence, has grown up between the parties. Thus, in the leading case, the donee was a clergyman who had acquired the management of the donor's property.

In a recent case, L, a man of no means, and a member of a religious sect, known as Exclusive Brethren, was employed as travelling companion to M, an epileptic subject of large fortune. While so employed, he converted M to his own religious views, and obtaining great influence over him, induced him to place nearly the whole of his fortune at L's disposal. After M's death, the executors of his will sued L to recover the moneys so obtained by him, and the court compelled restitution, even as to certain portions of the money which L had given to his relatives and friends, and which they accepted without any knowledge of the real source whence it had come. (*Morley* v. *Loughnan*, 1 Ch., 1893, p. 736.)

Where the issue of undue influence is raised, the court enquires; (1) whether the transaction was such as a right-minded person might be expected to do; (2) whether it was improvident; 3) whether legal advice, if wanting, was necessary; (4) whether the transaction originated with the donor. (*Mahomed Buksh Khan* v. *Hosseini Bibi*, 15 I. A. 81; *Behari Lall* v. *Habiba Bibi*, I. L. R. 8 All. 267.)

Equity will not arrest or set aside an act or contract merely because a man of more honour or greater delicacy would not have entered into it, but there must be some relation giving an influence which must be kept free from the taint of selfish interest, and cunning and over-reaching bargains (Story Eq. 308). The Illustration puts the case of A intercepting some property that might otherwise have accrued to B, as would happen in such a case as Illustration (*d*). Most of the reported cases under this head have, however, been instances of A receiving some advantage direct from B, by way of gift, conveyance or settlement. But nothing, I think, was intended to turn upon the form of words used in the Illustration. If the transfer to A is complete, the court will, in any case, declare A to be a trustee for B, and then decree the appropriate relief by requiring him to perform the trust, or re-convey the property, or (where that would give full

Relief given in such cases.

relief) by simply re-scinding the contract under ch. iv, or cancelling the instrument under ch. v. The same observation applies to all the Illustrations under this section; it will depend upon the circumstances of each case under which chapter of this Act relief is to be given, and that is why we have these Illustrations given here under a preliminary clause of interpretation rather than in the body of the Act. A court of equity will set aside a purchase made from a poor and ignorant man, at a considerable undervalue, the vendor having no independent advice, although there is no evidence of moral fraud on the part of the purchasers. The circumstances of poverty and ignorance of the vendor, and absence of independent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving that the purchase was fair, just, and reasonable. (*Fry* v. *Lane*, 40 Ch. D. 312).

Lawyer and client.

First, as to the relation of *legal adviser and client*. The principle is perhaps enforced more strictly as to this relation than any other. There is a leaning against a legal adviser deriving any other benefit than that of his legal fees. There are in this relation peculiar opportunities for over-reaching, there is acquired a minute knowledge of the client's affairs, and he generally is deprived of all other and independent legal advice. Hence the necessity for fencing the client against undue influence, and for casting upon the legal adviser the burden of proving the fairness of the transaction from which he derives a benefit; he must show that in regard to it, he placed himself in the position of a stranger to the client, so that his dealing with him was as unbiassed as if he had been a stranger. (*Hunter* v. *Atkins*, 3 My. & K. 135; *Morgan* v. *Minett*, 6 Ch. D. 638.) The same principle applies to a barrister as to a solicitor, and a deed by way of voluntary settlement due to the influence of the relation, though the service rendered had been very great and valuable, was set aside in a celebrated case. (*Broun* v. *Kennedy*, 9 Jur. N. S. 1163, and 10 Jur. N. S. 141.) The burden of establishing the perfect fairness, adequacy, and equity of a transaction of this kind is thrown upon the legal adviser (1 Story's Eq. 11; see also L. R. 1 Ind. Ap. 206). He is disabled from purchasing, for his own benefit, charges on his client's estates without his permission; and this disability will continue as long as the reason exists, although the confidential employment may have ended. [*Carter* v. *Pulman*, 8 Cl. & Fin. 657, 706; a case very much like that supposed in Illustration (*b*).]

In one instance a gift by a man to his solicitor for professional services over and above his fair bill of costs was set aside after a lapse of nine years. (*O'Brien* v. *Lewis*, 6 Jur. N. S. 528). Another case like that put in Illustration (*b*) is *Hobday* v. *Peters* (6 Jur. N. S. 794), where a solicitor's clerk, who was consulted by a lady in regard to a mortgage on her estate, was enabled, by means of the knowledge thus acquired, to purchase the mortgage at much less than its amount, and he was held to be a trustee for the lady, who was entitled to the benefit of the bargain. On the other hand, if it be shown that the relation has been completely dissolved and the antecedent influence has ceased, or if the transaction itself is totally disconnected with the relation, and concerns objects wholly independent of it, the gift or dealing between the parties will have the same validity as it would have if between strangers. (1 Story's Eq. 313; *Taylor* v. *Johnston*, 19 Ch. D. 603; *Mitchell* v. *Homfray*, 8 Q. B. D. 587.) In *Macleod* v. *Jones* (24 Ch. D. 289) a solicitor, who had taken a mortgage from his client, a lady, was restrained from selling under a power of sale, on account of the fiduciary relation existing between himself and his client. When the court is the seller of property, and the purchaser is a party to the litigation, in which the subject-matter of the sale is involved, there lies a duty on the part of the purchaser to deal honestly and straightforwardly, and to give complete and correct information upon all points upon which he is requested so to do by the court. (*Coaks* v. *Boswell*, 11 Ap. Cas. 232.)

Where a solicitor lends money to his client, it is incumbent upon the solicitor to explain to the client any unusual provisions in the deed executed by the client (*Cockburn* v. *Edwards*, 18 Ch. D. 449.) But where a client owed his solicitor money, which the latter was pressing him to pay, and the client gave him a promissory note for the amount of the debt payable on a specified date, and subsequently signed an agreement to mortgage, to the solicitor, his interest in a railway for the amount of the promissory note, and the agreement contained a provision that if the sum was not paid by the date upon which the money was payable under the promissory note, the solicitor should be at liberty to sell the property without notice, the fact of the existence of a fiduciary relationship between the parties was held to throw no responsibility on the solicitor to explain the unusual form of the power of sale. If there had been any real question whether the client understood the terms of the security, the case would have

been different, and the court drew a distinction between that before it, and the case of *Cockburn* and *Edwards*, inasmuch as in the latter case the mortgage was effected upon landed properties, and in the one before them, the security being railway shares, was supposed to be of a more variable value, and less secure, and on the further ground that as the client knew that he had to repay the money on the promissory note by a certain date, and the agreement to mortgage fixed the same date as that on which payment had to be made, it was the clear intention of the parties that the money was to be payable upon that date, and that therefore, there lay no duty on the part of the solicitor to have explained the clause, containing the immediate power of sale, though such a provision was unusual. (*Pooley's Trustee* v. *Whetham*, 33 Ch. D 111.)

It is the duty of a solicitor, dealing with his client's trustee in Bankruptcy, to make a full declaration, and not to take advantage of his special knowledge (*Luddy's Trustee* v. *Peard*, 33 Ch. D. 500). As to the rights of a firm of solicitors, to costs for work done on behalf of a trust estate, when one of the members of its firm is a co-trustee—see *Lawton* v. *Elwes* (34 Ch. D. 675.)

Doctor and patient.

Next, as to the relation of *medical adviser and patient*. The cases are not numerous, but obviously the relation is one that may easily give rise to undue influence, as well from partiality as from the fear of offending, where (as often happens), a knowledge of secrets of private life has been acquired by means of it. The Illustrations to this Act give some examples of how such knowledge might be abused by a medical adviser. [See s. 54 Illustration (*h*); s. 55, Illustration (*f*).] Often in cases of this kind the patient will, in the carrying through of the transaction, have had the benefit of legal advice, and so much in the way of objection may be obviated. (*Pratt* v. *Barker*, 1 Sim. 1; 4 Russ., 507; *Dent* v. *Bennett*, 4 My. & Cr. 273; *Gibson* v. *Russell*, 2 Y. & Col. (C. C.) 104.)

Religious adviser.

Thirdly, where the relation is that of *spiritual adviser*. The history of every religion in the world is unfortunately full of examples of how spiritual influence has been abused by ministers of religion for the gain of secular advantages. Under this head fall cases as to the validity of gifts from nuns to their convents, as to which it will suffice to refer to *Re Metcalfe's will* (10 Jur. N. S. 224 and 287). Somewhat similar was the case of

Nottidge v. *Prince* (6 Jur. N. S. 1066), where a gift of stock to the head of a peculiar religious establishment called an Agapemone, was set aside. So in *Lyon* v. *Home* (L. R. 6 Eq. 655), a gift and transfer of as much as £30,000 was obtained from an old woman by the influence of a spiritualist medium; this was an instance of a very gross fraud.

The principle of undue influence was very carefully examined in the case of *Allcard* v. *Skinner* (36 Ch. D. 145), where a lady, having passed through the grades of postulant and novice, became a professed member of a sisterhood, and in accordance with the rules by which it was regulated, gave up a considerable portion of her fortune to the lady superior. Some five years subsequently, she left the sisterhood, and five years after her severance with the institution, sued to recover some of the sums of money and railway stock she had transferred and given to the sisterhood. Upon the facts it was held that even though she had voluntarily and while she had independent advice, entered the sisterhood with the intention of devoting her fortune to it, yet as at the time when she made the gifts she was subject to the influence of the lady superior, and of a clergyman who had founded the institution, and to the rules of the sisterhood, she would have been entitled, on leaving the sisterhood to claim the restitution of such part of her property as was still in the hands of the lady superior, but not of such part as had been expended on the purposes of the sisterhood while she remained in it. The court of appeal, however, held that under the circumstances, the plaintiff's claim was barred by her lâches and acquiescence, since she left the sisterhood.

In discussing "the principles laid down by the Court of Chancery, in setting aside voluntary gifts executed by parties, who, at the time, were under such influence as, in the opinion of the court, enabled the donor afterwards to set the gift aside," Cotton, L. J., says: "These decisions may be divided into two classes—first, where the court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have, at, or shortly before, the execution of the gift, been such as to raise a presumption that the donee had influence over the donor. In such a case, the court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent

will, and which justifies the court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases, the court interferes not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused." Lindley L. J., in the same case says, that the doctrine of undue influence is founded on the principle that it is right and expedient to save persons from being victimised by other people, not on the principle that it is right and expedient to save persons from the consequences of their own folly. "Courts of equity," he says, "have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of the donors. The courts have always repudiated any such jurisdiction. *Hugenin* v. *Baseley* (14 Ves. 273) is itself a clear authority to this effect. It would obviously be to encourage folly, recklessness, extravagance and vice, if persons could get back property which they foolishly made *away with*, whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked, or misled in any way by others, into parting with their property, is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of, and been developed by, the necessity of grappling with insidious forms of spiritual tyranny, and with the infinite varieties of fraud."

Other fiduciary relations.

But besides the above three, there are other relations which have afforded occasion for this kind of relief, and notably so, the relations of parent and child, guardian and ward, and of trustee and beneficiary. Where a parent, or one who stands in *loco parentis*—obtains a pecuniary advantage from a child just after the child attains majority, and before there is really a complete emancipation from the parental influence, it will be presumed that undue influence has been exercised, though of course this may be adequately rebutted. (*Archer* v. *Hudson*, Beav. 551; *Bainbrigge* v. *Browne*, 18 Ch. D. 188.) But if the transaction is reasonable, and entered into in good faith, it will be maintained, though it was a pure gift, as of an annuity for life, by a son to a father.

Parent and child.

(*Blackburn* v. *Edgley*, 1 P. Wms. 600, and 1 Story Eq. 309.) Still, many cases have occurred where such recent gifts have been set aside as in *Davies* v. *Davies* (9 Jur. N. S. 1002). Often on a son's attaining majority, it is the occasion for re-settling the family property, and though parental influence may then be exercised, it will not so much affect the matter, if the case really falls within the class of cases on family arrangements to be considered more hereafter [see sec. 23, cl. (*c*).]

Guardian and ward.

Similarly, a donation from a ward to a guardian is looked upon with great jealousy, not so much on account of any actual unfairness in the particular case, as on the ground of public utility in checking the use of such opportunities. (*Hylton* v. *Hylton*, 2 Ves. 549.) This is especially so, if the gift is made when the accounts are still unsettled, or the property not fully transferred. In one case where a stranger of full age was about to marry a ward, and had deliberately agreed within two days after the marriage to give the guardian a release of all accounts of the mesne profits of the late ward's estate, afterwards this agreement was nevertheless set aside on the ground of public utility in checking such occasion for abuses. (*Duke of Hamilton* v. *Lord Mohun*, 1 P. Wms. 118.) Not that no grant of benefit to a guardian will ever be upheld, for if granted fairly and with perfect freedom, it may be not only a reasonable but a commendable act on the part of the recent ward. (*Hatch* v. *Hatch*, 9 Ves. 297.)

In *Waghela Raj Sanji* v. *Shekh Masludin* (14 Ind. Ap. 89), where a guardian covenanted, for herself and her infant ward, to indemnify the purchaser of the ward's estate against any claim by the Government, for revenue, it was held that it was beyond the power of the guardian to impose a personal liability on the ward. There is no rule in Indian law which gives a guardian and manager greater power to bind the infant ward by a personal covenant than exists in English law. "Equity and good conscience," say their Lordships in that case, is "generally interpreted to mean the rules of English law, if found applicable to Indian society and circumstances."

In *Wall* v. *Stanwick* (34 Ch. D. 763) when the owner of a public-house and cottages devised them to his widow during her life or widowhood, with remainder to his four infant children, and his widow married again, but continued to reside in, and manage, the public-house, and to receive the rents of the cottages, it was held that her position

was that of a bailiff for her infant children, and that she was therefore a trustee, and liable to account.

Trustee and beneficiary.

The like principle applies as between trustee and beneficiary, in accordance with the general rule in equity, that a trustee shall never make a profit to himself out of his trust. After all, it must be remembered that it is the existence of confidence, not of any special known relation between the parties, that is to be regarded. (*Hobday* v. *Peters*, 6 Jur. N. S. 794; see s. 88, Act II of 1882.)

A defaulting trustee cannot claim, as against the beneficiaries, any beneficial interest in the trust estate until he has made good his default. His assignee is in no better position, even where the default has been committed after the assignment. The liability extends not only to shares taken by the trustee under the instrument creating the trust, but also to derivative interests acquired by him in the trust estate. So where an executor and trustee entitled under a will to a life interest in a trust fund, took assignments from two of the beneficiaries, of their reversionary shares in the fund, and mortgaged the two shares so acquired, and the trustee was afterwards found to be a defaulter, the mortgagee was held to have taken subject to all the equities of the mortgagor, and the beneficiaries were held to be entitled to have the default made good out of the shares in the estate which had been acquired by her, in priority to the claims of the mortgagee. (*Doering* v. *Doering*, 42 Ch. D. 203.)

A release by two beneficiaries to their trustee (who was their aunt) was set aside after the lapse of more than twenty years, and after the death of the trustee, though no fraud, but only mistake, was alleged, and it was shown that the beneficiaries had signed the release without any independent advice. (*In re Garnett*, 31 Ch. D. 1.)

A trustee, who also has an equitable interest and receives trust funds, cannot take out of those funds anything at all until he has recouped the trust fund that which he has received out of it, beyond his own interest. His equitable interest is liable to make good his default as to what he has received in excess of his interest. (*In re Brown*, 32 Ch. D. 597.) Neither a solicitor-trustee nor the firm to which he belongs will be allowed profit costs out of the trust estate, for professional work done by the firm. (*In re Corsellis*, 33 Ch. D. 160.) Where an action was brought for an account of profits in respect of a purchase of trust property on allegations that the sale was secretly

made for the benefit of R, one of the trustees, with the connivance of T, another trustee, who was a solicitor, and the representatives of R claimed privilege from production for letters from T to R, and for T's bill of costs, on the ground that the communications were made by T acting as solicitor to R in his private capacity, production was ordered because the communications passed between two trustees, and because the solicitor and his client were charged with fraud. (*In re Postherthwaite*, 35 Ch. D. 722). Where a trustee who has power to invest on real security, invests on a mortgage of freehold houses, with power of sale, a larger sum of trust money than is justifiable, he is liable to make good any loss. (*Priest* v. *Uppleby*, 42 Ch. D. 351.)

Thus, relief of this kind has been given where the transaction was between a younger sister and her elder sister (*Harvey* v. *Mount*, 8 Beav., 439); where a person had been employed by a relation to advise a young spendthrift and settle his debts for him (*Tate* v. *Williamson*, L. R. 1 Eq. 528, and 2 Ch. 55); where an old woman had been imposed upon by relations with whom she lived (*Anderson* v. *Elsworth*, 7 Jur. N. S. 1047); where the dealing was between an old woman and a man much her superior in position (*Baker* v. *Monk*, 10 Jur. N. S. 624 and 691); where it was between a man and a woman to whom he was engaged to be married (*Page* v. *Horne*, 11 Beav. 227); and, in another case, between a man and a woman who lived with him as his mistress (*James* v. *Holmes*, 8 Jur. N. S. 553).

Tests of undue influence.

In judging of the validity of transactions between persons standing in a confidential relation to each other, the material point to be considered is, whether the person conferring the benefit on the other had competent and independent advice. The age or capacity of the person conferring the benefit, and the nature of the benefit, are of but little importance in such cases; they are important only where no such confidential relation exists. Where a confidential relation is established, its continuance is presumed, unless there is distinct evidence of its determination; but a trifling benefit conferred by one person, on another standing in a confidential relation to him, will not be set aside unless there be *mala fides* (*Rhodes* v. *Bate*, L. R. 1 Ch. 252; *Mitchell* v. *Homfray*, 8 Q. B. D. 591.)

It is not because one person has unbounded influence over another, that therefore, when exercised, even though it may be very bad indeed,

it is undue influence in the legal sense of the word. A young man may be caught in the toils of a harlot, who makes use of her influence to induce him to make a will in her favour. It is unfortunately quite natural that a man so entangled should yield to that influence and confer large bounties on the person with whom he has been brought into such relation; yet the law does not attempt to guard against those contingencies. A man may be the companion of another, and may encourage him in evil courses, and so obtain what is called an undue influence over him, and the consequence may be a will made in his favour. But that again, shocking as it is, perhaps even than the other, will not amount to an undue influence. To be undue influence in the eye of the law, there must be—to sum it up in a word—coercion. To establish undue influence sufficient to invalidate a will, it must be shewn that the will of the testator was coerced into doing that which he did not desire to do, and the mere fact that in making his will he was influenced by immoral considerations, does not amount to such undue influence so long as the dispositions of the will express the intentions of the testator. (*Wingrove* v. *Wingrove*, 11 P. D. 81.) The Privy Council said, in one case, that undue influence is generally interpreted to mean the rules of English law, if found applicable to Indian society and circumstances (*Waghela Raj Sanji* v. *Shekh Masludin*, 14 Ind. Ap. 89; see also *Rani Janki Kunwar* v. *Raja Ajit Singh*, 14 Ind. Ap. 148). The question of what constitutes undue influence has also been considered at great length in the case of *Allcard* v. *Skinner* (36 Ch. D. 145) and in the very recent case of *Morley* v. *Loughan* (1 Ch., 1893, p. 736).

Extent of relief given.

Equity gives relief in transactions of this kind not only against the person exercising the undue influence and procuring the benefit, but against third persons, though themselves innocent of fraud, who, with notice, or without consideration, participate in the benefit. And where a debtor unduly influenced his niece (lately his ward) to join in a guarantee, relief was given against the creditors who took it with notice of the relation, and that she received no consideration for it. (*Maitland* v. *Irving*, 15 Sim. 43; see also Act II of 1882, § 89.) So also, a benefit that is thus tainted in its origin, is not purified by being partitioned among the innocent relations of the guilty party. (*Bridgman* v. *Green*, 2 Ves. 627.)

So in *Morley* v. *Loughnan* (1 Ch., 1893, p. 736) where a person, by the exercise of undue influence obtained money from an invalid in his charge and made portions of such money over to his relatives and friends without notice of the source whence or the means by which he had obtained it, the transferees were compelled to restore it to the heirs of the invalid. But this observation does not apply where the third person is a purchaser for valuable consideration without notice of the origin of the transaction. (*Blackie* v. *Clark*, 15 Beav. 595.)

Ground of specific relief.

Illustrations (*c*), (*d*), (*e*), and (*f*). These four Illustrations are all examples of the same class of cases, and the ground on which specific relief is granted resembles, or at least is not very divergent from, the principle on which relief is given in the class of cases of which Illustration (*b*) is an example. In each of these four instances, the relation between A and B is one created purely by express contract between them, and in each the act of A is a breach of the unexpressed but implied obligation in the contract that no other than the agreed profit is to be made out of the contract; in each case it is a fraud on the part of A that he has so used the contractual relation as to gain an advantage to himself in excess of the proper purposes of the contract. In each there is a breach of the confidence implied from the contractual relation, and in this aspect the cases resemble Illustration (*b*). The banker is entrusted with B's funds to use for his own profit in the ordinary way, but to publish the state of his account to others is a breach of confidence, and to sell the knowledge of his credit is a fraud. The mortgagee is entrusted with the legal ownership as a security for his loan, but to turn it into money by taking a renewal of the leases for himself is in excess of the purposes of the contract, and a breach of faith. So also the partner and the manager are respectively agents for the co-partner and the principal, and can derive no profit from the relation beyond that agreed upon.

Illustration (*d*) is in accordance with a very old decision by Lord Chancellor Nottingham, who said: "The mortgagee here doth but graft upon his stock, and it shall be for the mortgagor's benefit" (*Rushworth's case*, Freem, 12), and it will be the same though the lease had expired before renewal. On the other hand, if a lessee mortgage leaseholds, and afterwards obtains a new lease, this will be held

to be a graft on the old one for the benefit of a mortgagee (*Smith* v. *Chichester*, 1 C. & L. 486, and s. 71, Act IV of 1882), and it will be the same if the lease be one charged with legacies or other incumbrances.

Where one of three mortgagees in possession acted as solicitor for the others in the transaction and sold under the powers of sale in their mortgage-deed to a company formed for the purpose of purchasing the property, and where the mortgagee so acting on behalf of his co-mortgagees was instrumental in promoting the company and acted as its solicitor and had a substantial interest as a shareholder in the company, it was held that the sale could not be set aside merely on the ground that he was a shareholder in the company, for that a sale by a person to a corporation of which he is a member is not either in form or in substance a sale by him to himself along with other people. But the court considered that there was such a conflict of interest and duty in him, of which the company had notice, as to throw upon the company the burden of upholding the transaction, and that the company had discharged themselves of this burden by shewing that he had taken all reasonable pains to secure a purchaser at the best price, and that the price given was not at the time inadequate, though more might have been obtained by postponing the sale. (*Farrar* v. *Farrars Limited*, 40 Ch. D. 395.)

Illustration (*e*) is precisely the case of *Bentley* v. *Craven* (18 Beav. 75) and Illustration (*f*) in principle and circumstances is the same as *Massey* v. *Davies* (2 Ves. 317). An agent employed to purchase, cannot legally buy his own goods for his principal; neither can an agent employed to sell himself purchase the goods of his principal. If he should do so, and thereby make a profit, his principal may either repudiate the transaction altogether, or, adopting it, may claim for himself the benefit made by his agent.

Where an agent, before accepting the agency, has an interest in the property, and during the agency sells that property to his principal, without disclosing his interest, the principal would have a right to rescind. But where the principal has exercised his option by confirming the contract, with knowledge of the facts, the agent is not liable, after such affirmance, to his principal. The adoption of the contract by the principal puts an end to any further rights against the agent. (*In re Cape Breton Company*, 29 Ch. D. 795, at pp. 811, 812.)

So, where an uncle employed defendant to settle the debts of his nephew, and defendant bought from the nephew his interest in an estate without communicating to him an estimate he had obtained of its value, the transaction was set aside. (*Tate* v. *Williamson*, L. R., 1 Eq. 528, and 2 Ch. 55.) Where a man employs another as his agent (and one partner is the agent for his co-partners), it is on the faith that such agent will act in the matter purely and disinterestedly for the benefit of his employer, and assuredly not with the notion that the person, whose assistance is required as agent, has himself in the very transaction an interest directly opposed to that of his principal (*per* Langdale, M. R., in *Gillett* v. *Peppercorn*, 3 Beav. 78).

As to following money, which has been improperly received by a trustee or other person acting in a fiduciary capacity, there is no difficulty. But this remedy is not available unless a fiduciary relationship has been established. So, where an agent corruptly received commission from the vendors of goods, from whom he purchased on behalf of his principals, and his principals sued him to recover the moneys so paid to him, claiming to be entitled to follow such moneys into the investments thereof, and when they moved for an injunction to restrain the defendant from dealing with the investments, or for an order directing him to bring the moneys and the investment into court, it was held that the relation between the defendant and the plaintiffs was that of debtor and creditor, and not that of trustee and *cestui que trust*, and that plaintiffs were not entitled to the order. (*Lister & Co.* v. *Stubbs*, 45 Ch. D. 1.)

Cases of renewal of leases.

Hence, also, the rule laid down in a large class of cases of which *Keech* v. *Sandford* (1 L. C. in Eq. 46) is the leading case, that one who is a trustee for another cannot, even in the absence of fraud and upon the refusal of the lessor to grant a new lease to the beneficiary, take a renewal of the lease in his own name and for his own benefit; but it shall be for the benefit of the beneficiary. Advantage, or no advantage, would not be a satisfactory principle on which the validity of such transactions should depend; but public policy prevents persons in such situations from acting so as to take a benefit to themselves (2 Spence's Eq. 300). Similarly, if a person having a limited interest, as tenant for life, renews a lease, or gets a more durable term in his own name, he will be held a trustee for those entitled in remainder to the old lease (see *James* v. *Dean*, 11 Ves. 383). The rule would,

of course, be the same where one partner renews in his own name, a lease of the partnership premises. (*Featherstonhaugh* v. *Fenwick*. 17 Ves. 311.)

If a tenant for life, or trustee of a lease, purchased the reversion, it was formerly doubted whether any trust would arise thereto; but in *Phillips* v. *Phillips* (29 Ch. D. 673), the rule was extended in the case of a perpetually renewable lease, and the purchase of the reversion was held to enure for the benefit of the other beneficiaries in remainder. It is doubtful, however, if any trust would have been created if the lease in that case had not been one renewable by custom, but an ordinary one, so that the purchase of the reversion did not affect the extent of the interest under the lease, which was the subject-matter of the original trust. In such a case as the latter, my own view is against any trust, as the interest acquired is distinct from, and not in substitution of, the leasehold interest; and there seems no ground, in such case, for declaring the purchase to be a trust for those who have nothing at all to do with the reversion (see *Randall* v. *Russell*, 3 Mer. 190; *Norris* v. *Le Neve*, 3 Atk. 26; this seems also to be the purport of s. 90 of Act II. of 1882).

Constructive trustee.

In a proper case a trustee may pay costs, properly incurred to his solicitor, out of the trust estate. Solicitors cannot be made liable as constructive trustees unless they are brought within the doctrine of the court with reference to other strangers, who are not themselves trustees, but are liable in certain cases to be made to account as if they were trustees. The general doctrine with reference to constructive trusts of that kind is that a stranger to the trust, receiving money from the trustee which he knows to be a part of the trust estate, is not liable as a consfructive trustee unless there are facts brought home to him which shew that to his knowledge the money is being applied in a manner which is inconsistent with the trust, or (in other words) unless it be made out that he is either a party to the fraud, or to a breach of trust on the part of the trustee. The power of the trustee to employ agents to assist him in the execution of the trust is not to be narrowly limited; and a mere suspicion or intimation that something is wrong in the administration of the trust will not be sufficient to deprive the solicitor of his right to accept payment out of the trust estate, of costs, charges, and expenses properly incurred. (*Blundell* v. *Blundell*, 40 Ch. D. 371.) So long as the trustee employs persons properly

qualified, he cannot be made responsible for their diligence or honesty; but he cannot entrust persons with any duties which they may be willing to undertake, or to pay them any remuneration they may demand; and he is bound to exercise his discretion in the matter. (*Andrews* v. *Weall*, 42 Ch. D. 674.) A trustee is bound to conduct the business of the trust as an ordinarily prudent business man would his own, and he may employ brokers and agents, as in the ordinary course of business. Where, under such circumstances, trust funds are embezzled by the brokers, or agents, the trustee is not liable to make good the default. (*Speight* v. *Gaunt*, 9 Ap. Cas. 1.)

Agent to sell or buy when a trustee.

The same principle applies where the conflict between the interest and the duty of one standing in a fiduciary relation to another arises in a different way, as where one entrusted to sell or to buy property on behalf of another, purchases it for himself, or himself sells it to the other, without the knowledge or assent of the other. *Fox* v. *Mackreth* (1 L. C. in Eq. 123) is the leading case in this large class of cases under which Illustrations (*e*) and (*f*) both fall. As Lord Thurlow said in that case: "If a trustee, though strictly honest, buys an estate himself and then sells it for more, yet, according to the rules of a court of equity, from general policy and not from any peculiar imputation of fraud, a trustee shall not be permitted to sell to himself, but shall remain a trustee to all intents and purposes." So Lord Eldon said in another case: "You may see in a particular case that the trustee had not made advantage, but it is utterly impossible to examine, upon satisfactory evidence, in ninety-nine cases out of a hundred, whether he had made advantage or not" (*Ex-parte Lacey*, 6 Ves. 627; *Mookerjee* v. *Mookerjee*, L. R. 2 Ind. Ap. 18); and therefore the general rule prevails that, in every case, the beneficiary shall have the option of setting the sale aside. The rule holds good though the sale is by public auction, and the trustee purchases for himself at it.

A mortgagee, exercising his power of sale, cannot purchase the property on his own account, nor can the solicitor or agent of such mortgagee do so either. Where property was mortgaged to a society, and the secretary, at the sale, openly bought two lots on his own account, and no under-value was shewn, yet the sales where held not to be maintainable against the mortgagor. (*Martinson* v. *Cloves*, 21 Ch. D. 857.) Where two perso nscarried on a business together in co-partnership,

and during the temporary unsoundness of mind of one of the partners, his chattel interest in the firm was attached in execution of a decree, and sold by the sheriff, and was bought at an under-value by the other partner, the sale was set aside. (*Helmore* v. *Smith*, 35 Ch. D. 437.) But the rule does not prevent the trustee purchasing from the beneficiary or other party direct, where there is a distinct and clear contract, and there is no fraud, no concealment, no advantage taken by the trustee, of information acquired by him in the character of trustee (*Coles* v. *Trecothick*, 9 Ves. 234); and this qualification of the rule is clearly referred to in both Illustrations (*e*) and (*f*). But the property so purchased is liable, either in the hands of the trustee, or of his assignee, to make good any default made by the trustee in the trust funds, and the property is liable even when the default was made by the trustee, subsequent to the assignment by him. (*Doering* v. *Doering*, 42 Ch. D. 203.)

Principal and agent generally.

An agent or solicitor employed to sell is, of course, equally within the rule; and the moment it appears in a transaction between principal and agent that there has been any underhand dealing by the agent,—that he has made use of another person's name as the purchaser instead of his own,—however fair the transaction may be in other respects, from that moment it has no validity in equity. (*Trevelyan* v. *Charter*, 9 Beav. 140.) When leave has been given by the court, to a solicitor, or other fiduciary agent, to bid at an auction or enter into a contract of sale, the effect is to put an end to the fiduciary relation and to place him in the position of a mere stranger, and consequently, he is not under any obligation to the court to disclose any facts affecting the value of the property, but he must give the court full information upon any points upon which he is requested to furnish information. (*Boswell* v. *Coaks*, 23 Ch. D. 302, upheld by the House of Lords in 11 Ap. Cas. 232.) Similarly, an agent employed to purchase a property, to obtain a lease or to settle a debt, is a trustee for any profit he may make out of the transaction. Hence, also, the presumption that property bought by a trustee, who is empowered to buy such property with trust money, was bought for the purposes of his trust and belongs to the beneficiary; and if an agent or trustee mixes that property with his own, so that he is unable to distingush them, the whole will treated as trust property, subject to any equitable claim which the agent or trustee may be able to establish.

(*Harris* v. *Truman*, 7 Q. B. D. 340, 353 and 358 S. C. 9 Q. B. D., 264; see Act II of 1882, ss. 51–53.) And a sale by an executor to himself, of his testator's property, is voidable (*Beningfield* v. *Baxter*, 12 Ap. Cas. 167); and a managing shareholder of a company is liable for profits he receives in respect of the business of the company. (*Boston D. S. F. Co.* v. *Ansell*, 39 Ch. D. 338.)

So, a surety who gets rid of the debt at less than its full amount, can only charge the principal with what he has actually paid. (*Reed* v. *Norris*, 2 My. & Cr. 361.) A counsel employed as confidential adviser, or a person chosen as arbitrator, cannot be permitted directly or indirectly to make use of the knowledge or opportunities acquired by the employment, to obtain a benefit for themselves. (*Carter* v. *Palmer*, 8 C. & F. 657; *Blennerhassett* v. *Day*, 2 Ball & B. 116.)

Terms on which relief is given.

Where a person has been declared to be constructively a trustee for another, and the transaction is set aside, relief is given only upon the terms that he who seeks equity must do equity. In the case of a renewed lease, an assignment will be decreed, but the defendant must be indemnified against the covenants, and he has a lien for his proper costs and expenses with interest, and also for lasting improvements, not being mere matters of taste, he being charged on the other hand for any waste. So if a re-conveyance in case of a purchase is decreed, the defendant must be repaid the purchase-money with interest, with a similar allowance for repairs or improvements, and charge for waste, and also for rent and mesne profits.

The Court of Chancery guards the interests of the *cestuis que trustent* with great jealousy and will only compel them to indemnify the trustees in very clear cases. In the case of *Sawyer* v. *Sawyer* (28 Ch. D. 595), where there had been a breach of an express trust by the trustees, and they claimed to be indemnified against their liability out of the interest of those beneficiaries who had acquiesced in their committing, or procured them to commit, the breach of trust, one of them being a married woman, the court held that it was requisite for the trustees to show that she acted for herself in the breach of trust, and that she was fully informed of the state of the case.

Ratification and acquiescence.

Lastly, a voidable transaction giving rise to a constructive trust may be validated by confirmation or by acquiescence. To constitute a valid confirmation, the person must be aware that the act he is

doing, will have that effect, and that the prior transaction is voidable. It must not be done under the force, pressure, or influence of the former transaction, but must be an act separate and distinct from it, and not a mere conveyance executed in consequence of a contract or covenant connected with it. (*Morse* v. *Royal*, 12 Ves. 370.) So, to fix acquiescence upon a party, it should unequivocally appear that he knew the fact upon which the supposed acquiescence is founded, and to which it refers. (*Randall* v. *Errington*, 10 Ves. 428.) Although acquiescence in an improper sale may be such as to prevent its being set aside by the one party, it does not therefore follow that the discretionary power of compelling specific performance of the agreement to sell should be exercised in favour of the other party. (*Salmon* v. *Cutts*, 4 De G. & S. 125.)

An owner can ratify the acts of an agent *de son tort*. (*Lyell* v. *Kennedy*, 14 Ap. Cas. 437.) In any case, the ratification must be within a reasonable time. (*Portuguese Consol. Co.*, 45 Ch. D. 16.)

Illustrations (*g*) and (*h*).—These are two simple examples of a very intricate subject in equity, that of notice, on which *Le Neve* v. *Le Neve* (2 L. C. in Eq. 32) is the leading English case. Notice is twofold, either *actual*, as in Illustration (*g*), or *constructive*, that is, arising by operation of law, as in Illustration (*h*). But the doctrine of notice in both kinds is applicable to a twofold and converse class of cases; either it may be applied, as in both these Illustrations, to postpone or defeat a subsequent purchaser or incumbrancer taking with notice, and to convert him into a trustee for the holder of some prior interest; or it may be applied to protect one whose interest is subsequent in point of time, but who is a *bonâ fide* purchaser or incumbrancer for valuable consideration, but without notice of some prior-existing interest or incumbrance.

Notice, doctrine of. Division of the subject.

In English treatises in the discussion of the doctrine of notice, these two classes of cases are inextricably mixed together, and indeed they are not easily severable.

Strictly speaking, as it is only in the first class of cases that the question of the creation of a trust can arise, we need not, for the purposes of this Act, consider the second class of cases at all. But as the discussion of the topic would otherwise be very imperfect, I propose to state briefly the general principles governing the second class of cases.

When only notice is material.

Then, as to the first class of cases, of which the Illustrations are examples, the remark that lies at the threshold is this: When only is it material to the interests of B whether A has had notice or not? Clearly, if X be the seller or grantor, and the prior contract with B is complete in all respects, so that all the interest of X has already passed out of him, there is nothing left in X to pass to A, and the title of B must prevail against A, whether A had notice of it or not. Similarly, if, in Illustration (*h*), C is lessee in possession under a lease for a term of years, complete in all respects, B cannot pass to A a better title than he himself has got, and A must take the land subject to the lease or other interest of C, whether A had notice or not. It follows, therefore, that in this class of cases, where the prior interest is a legally complete interest, it must prevail, and the question of notice or not, is immaterial to the decision of the case. It is only where the interest which is prior in time does not confer a legally complete title, but only an equitable right, leaving the legal estate still vested in the original owner, that it is material whether A, when he took his conveyance, had notice thereof so as to make it inequitable, or fraudulent (to use another term), for him to defeat such prior equitable interest by means of his subsequent legal title. In other words, where there is notice in such a case, A takes the property subject to the same equities as it was liable to in the hands of the original owner. In *Mutual Life Assurance Society* v. *Langley* (32 Ch. D. 460) there was a trust fund in court, and A was an incumbrancer subsequent to B, but without notice of B's incumbrance. A first obtained a stop-order on the fund, and thereby became prior to B, although when A got his order, he had notice of B's incumbrance.

Doctrine in Acts II and IV of 1882.

This doctrine may also be gathered from the Transfer of Property Act IV of 1882. Thus in s. 54 we find given the distinction between a sale of land and a contract for sale. After describing the essentials to a valid and complete sale of immoveable property the section continues—"A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property." This is in substance the same distinction as is known to English law between a legal conveyance of land, and an agreement for sale, which only a court of equity, acting

on the maxim that what is agreed to be done is to be taken as done, will enforce by requiring a formal conveyance to be executed. The like course would be adopted by our courts in India in regard to a contract for sale as described in Act IV of 1882; and it is in respect to such contracts or agreements that the doctrine of notice is applicable. Hence, in the Indian Trust Act II of 1882, s. 91, it is laid down that "where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter (*i.e.*, be a trustee for him), to the extent necessary to give effect to the contract." (See also the general proviso in s. 96 of the same Act.) Again, in s. 40 of Act IV of 1882, it is provided that the burden of an obligation imposing a restriction on the use of land, or of an obligation annexed to the ownership, but not amounting to an interest or easement, may be enforced against a transferee with notice thereof, or a gratuitous transferee of the property affected thereby (*i.e.*, whether he be with or without notice), but not against a transferee for consideration and without notice; and then, as an illustration, is given the case of a contract for the sale of an estate, and a subsequent complete sale of it to another with notice of the prior contract. Here we have the application of the doctrine of notice in both classes of cases recognised. Similarly, in s. 39 of the same Act, the application of the doctrine is recognised in respect to the transfer of property which is subject to a contract for an interest by way of charge in favour of a third person. Again, both in s. 43 and in s. 53, there is a clause saving the rights of a transferee in good faith for consideration without notice in the cases of transfer described respectively in those two sections. Further, in the chapter of that Act relating to mortgages, in s. 78 and again in s. 81, an advantage is secured in favour of a subsequent mortgagee in certain circumstances acting without notice of a prior mortgage; and although s. 80 expressly abolishes the English equity doctrine of tacking in mortgages (in respect to which notice is of peculiar value), this is, as we shall hereafter see, simply due to the constitution of our courts in India, and the legal equality of all mortgages. Lastly, both in Act II and Act IV of 1882, there is the same definition of notice, namely, that "a person is said to have notice of a fact either when he actually knows that fact or when, but for wilful abstention from inquiry, or gross negligence, he would have

known it, or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, s. 229." The terms of s. 229, Indian Contract Act, are that "any notice given to, or information obtained by, the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal." * This proviso, restricting the knowledge of the agent to the course of the same transaction is, as we shall see, an important qualification of the wider rule of English law.

I pass now to consider the two kinds of notice; and *first*, as to actual notice. This may be either direct to the person to be affected thereby, or indirect to his agent in the transaction. Actual notice, to be effective, must be given by a person interested in the property, and in the course of the treaty. Vague reports from strangers, or a mere general assertion that some other person claims a title, is not enough; and the same principle applies to a notice which the solicitor or agent may have had. (Sugden's V. and P. (13th ed.), 621; 2 Spence's Eq. 753.)

Actual notice, what is.

Secondly, as to constructive notice. This assumes that no proof is given that the party had actual notice of the fact itself, but he is affected with notice of the fact by construction of law (2 Spence's Eq. 754). The question is, not whether the purchaser had the means of obtaining, and might, by prudent caution, have obtained the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence. (Sugden's V. and P. 622.) The means of knowledge, by which a party is affected with notice, are such as are practically within reach, and of which a prudent man might have been expected to avail himself. (*Broadbent* v. *Barlow*, 7 Jur. N. S. 479.) A person is thus fastened with knowledge of a fact, which he might have learnt if he had not neglected to inquire, but not also with knowledge of a fraud committed by the person of whom he was bound to inquire. (*Hopkins* v. *Amery*, 6 Jur. N. S. 1047.)

Constructive notice, what is.

The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained the knowledge in question but whether the not obtaining it was an act of gross or culpable

negligence. (*Per* Lord Cranworth in *Ware* v. *Lord Egmont*, 4 D. M. & G. 460.) For an instance where it was held that there was no constructive notice, under the circumstances, through a solicitor, see *In re A. W. Hall & Co.* (37 Ch. D. 721) where the case of *Ware* v. *Lord Egmont* is cited in the judgment of Stirling, J. It thus depends upon the particular facts of each case, whether notice ought to be constructively imputed. In one case it was said that the cases of constructive notice divide themselves into two classes; first, where there is actual knowledge of a fact, and that it does relate to the property, and an omission to learn by inquiry what that fact would have led to; and secondly, where the party has designedly abstained from inquiry, for the purpose of avoiding knowledge. Hence, if there is no such actual knowledge, or no fraudulent turning away—if mere want of caution, as distinguished from wilful or fraudulent blindness, is all that can be imputed to the purchaser—the doctrine is not applied, but he is deemed a *bonâ fide* purchaser without notice (*per* Wigram, V.C., in *Jones* v. *Smith*, 1 Hare 55). Many cases have occurred in which the purchaser has, in the particular transaction, employed the same solicitor or agent as the vendor (often the vendor's ordinary solicitor), and he has been held to be affected with notice of facts known to such solicitor, and these cases have sometimes been classed with cases of constructive notice. But they are not really so; the notice to a man's agent may be either actual or constructive, and it is not whether the parties have separate agents or not, but the fact of agency that is material; and the only peculiarity about these cases is, that they illustrate the folly and danger of a purchaser or mortgagee employing the other party's solicitor to act also for himself.

Notice to agent is actual or constructive.

Where a solicitor acts between the mortgagor and several successive mortgagees on different occasions, and where it is sought to establish constructive notice through the solicitor so acting, when the question of priority is raised, it must be proved that the solicitor had notice at the time when the mortgage was effected, of which priority is sought to be established. (*In re Cousins*, 31 Ch. D. 672.)

The leading case (*Le Neve* v. *Le Neve*, 2 L. C. in Eq. 32) strikingly illustrates some of the consequences of actual notice. A married B, who had a large fortune, and in consideration thereof A's father settled certain lands in trust

Case of actual notice.

(amongst other things) for B and her children by A. This deed ought, to make it effective, to have been registered, but this was omitted. Many years afterwards B died leaving two children, and subsequently A married C. He then settled some of these lands in trust (amongst other things) for the benefit of C, and this deed was (as the law required) duly registered. This deed was purposely contrived to get the better of the former deed. The suit was by the children of B to set aside the deed to C, and it was decreed accordingly. Notwithstanding the Registry Act, and that the first deed was thereby legally incomplete, the notice which C had of the interest contracted for on behalf of B's children, was held to raise an equity sufficient to postpone her interests to theirs.

Selwyn v. *Garfit* (38 Ch. D. 273) was a case where A mortgaged property to B and the deed contained a covenant to pay within six months, and a power of sale in the usual form, with a proviso that the powers should not be exercised until B had given three months' notice to A. The deed also contained a clause protecting purchasers in any sale purporting to be made under the power. A subsequently mortgaged his equity of redemption. Two months after the date of the mortgage, B gave notice to A to pay off the debt, and seven months after the date of the mortgage, sold the property to C. In a suit by A to set aside the sale, it was held that C must have known that the condition for the exercise of the power of sale had not been complied with by B, and that as A had incumbered his equity of redemption, and was therefore not in a position to waive the necessity of notice, C had no right to assume there had been any such waiver.

The doctrine of notice, actual or constructive, is applied even in the case of purchasers at an execution-sale. So where an *ex-parte* decree for money had been obtained against a Hindu governed by the Mitakshara, upon a bond whereby he had mortgaged his ancestral immoveable estate, and the property was attached and sold, but prior to the execution-sale, the judgment-debtor died, and his infant sons and co-heirs, on filing objections, had been referred to a regular suit.

So, where the heirs of a deceased judgment-debtor, governed by the Mitakshara law, preferred a claim to property of the judgment-debtor, when under attachment, and before sale in execution, and they were referred to a regular suit, and the property was in the meantime sold in execution of the decree, it was held, after the heirs had established their claim in the suit, that the auction-purchaser had full notice by

the claim that the heirs had made in the execution-proceedings. (*Suraj Bunsi Koer* v. *Sheo Proshad Singh*, L. R., 6 I. A. 88.)

There is no material difference in the wording of the Indian Registration Act (III of 1877, ss. 49, 50), and it seems an unavoidable conclusion that the like equity must prevail in India. As was remarked in one case, the policy of enactments requiring registration to perfect conveyances, is not invaded by the equitable doctrine that a subsequent and registered contract is affected and postponed by notice of a prior but unregistered contract in respect to the same subject-matter. Since *Le Neve* v. *Le Neve*, the equity of acting upon the conscience of the second purchaser has been recognised, however much it has been, and may be doubted whether the doctrine, especially of constructive notice, has not been carried too far. (*Greaves* v. *Tofield*, 14 Ch. D. 571.)

Cases of constructive notice.

To multiply examples of constructive notice is not of much value, as the facts of two cases are never precisely the same, and each case must turn on its special facts. A few illustrations may be given. In a treaty of purchase, not to make any inquiries as to the title-deeds of the property, would be such gross negligence as to be constructively fraudulent; and notice that they are in another man's possession may, with other circumstances, be held to be notice of his claim upon the property, but not if there was a *bonâ fide* inquiry for the deeds and a reasonable excuse given for their absence.

A new trustee will not have constructive notice of what does not appear among the trust documents, although the retiring trustee has had notice. (*Hallows* v. *Lloyd*, 39 Ch. D. 686.) For a case where a mortgagee was held to have had notice of the real nature of an apparent deed of sale, which formed the mortgagor's title, see *Carter* v. *Molson* (10 Ap. Cas. 664).

In *Manners* v. *Mew* (29 Ch. D. 725) a mortgagor, who was the solicitor of the mortgagee, made excuses for not giving the mortgagee the deeds, and subsequently deposited them with another mortgagee, as security for money advanced without notice of the legal mortgage, and it was held that the first mortgagee was not postponed to the mortgagee by deposit, as he had not been guilty of any fraud, or negligence amounting to fraud.

Many cases have occurred upon the rule that a purchaser who has actual notice of one instrument affecting an estate, has constructive

notice of all other instruments to which an examination of the first could have led him. Similarly, a purchaser with notice of the existence of a deed affecting the estate, as a lease, has notice of all its contents, as the covenants in the lease, though peculiar and unusual. But this rule is subject to two limitations; thus, *firstly*, it is a good rule in favour of the party claiming under the lease or other deed as against the purchaser when the transaction has been completed; but in a suit for specific performance of the contract by the seller against the purchaser, the surprise of the peculiar covenants may form an adequate defence in his favour. (*Martin* v. *Cotter*, 3 J. & L. 506.)

It is necessary carefully to observe this first limitation, which has sometimes been overlooked. (See *James* v. *Lichfield*, L. R. Eq. 9, 51, which is certainly bad law.) The doctrine in question refers only to the equities between the purchaser and the tenant when the legal estate has passed, and has nothing to do with the rights and liabilities of vendors and purchasers between themselves, whilst the matter still rests in contract. If there is anything in the nature of the tenancy which affects the property sold, the vendor is bound to tell the purchaser, and to let him know what it is which is being sold; and the vendor cannot afterwards say to the purchaser, "If you had gone to the tenant and inquired, you would have found out all about it." (*Caballero* v. *Henty*, L. R. 9 Ch. 447.) Such a matter would form ample ground of defence under s. 28 of this Act.

Then, *secondly*, if notice of the deed is accompanied by a false statement of its contents showing that it does not relate to the property being treated for, this is not, constructively, notice of its true contents; for a purchaser is not bound to inquire wherever he has notice of a deed which, by bare possibility, may affect his purchase. (*Jones* v. *Smith*, 1 Hare 43; *Williams* v. *Williams*, 17 Ch. D. 437.) But this is so only where the deed is either collateral, or such as that it may or may not affect the property in question; if it is such that it is known that it must relate to the property, then no representation, however strong, will prevent constructive notice of its real contents; thus, a lessee is affected by constructive notice of a restrictive covenant in his lessor's title-deed, however much he may have been told that there was none such. (*Patman* v. *Harland*, 17 Ch. D. 353.) So it has been held that it is not sufficient notice if a deed is merely referred to in the conditions of sale, unless the purchaser could have examined the deed; and if the contents of the

deed are stated in the conditions of sale, he is not bound to inquire for, or examine the deed. (*Cox* v. *Coventon*, 8 Jur. N. S. 1142.)

Constructive notice from occupancy.

As in Illustration (*h*), the occupancy of the land by another is a fact that raises a duty to inquire; this was the case of *Taylor* v. *Stibbert* (2 Ves. Jr. 437), where it was held that one who buys an estate, knowing it, or parts of it, to be in the occupation of a tenant, must not take it for granted that it is only a tenancy from year to year, but is bound by such lease as the tenant has. The rule has not been limited to the terms of the tenancy, but if the tenant in possession has entered into a contract for the purchase of the estate, a subsequent purchaser will be held to have had constructive notice of the contract, as he was bound to make inquiry from the tenant, which would have led him to a knowledge of it. (*Daniel* v. *Davison*, 16 Ves. 249; 17 Ves. 433.) It has been said that this case went too far, but it was really a case within the first limitation above-mentioned, and the terms of Illustration (*h*) would justify a like decision in India. But notice of a tenancy is notice only of such equities as the occupier may insist on; it does not go beyond, so as to be constructive notice of his lessor's title, and a possession to operate as constructive notice must be the actual occupation of the land. (Sugden's V. and P. 633.) Similarly, notice of a right of easement or other similar right in another, raises a duty to inquire as to its nature and extent. (*Hervey* v. *Smith*, 1 K & J. 394.) Where the possession is vacant, though the property is described as lately in the occupation of A, this raises no duty to inquire of A as to his interest. (*Miles* v. *Langley*, 1 R. & My. 39.)

There is a great conflict of decisions as to the necessity of possession following a sale or mortgage to make it valid under the Hindu Law (see the cases discussed by Mr. Mayne in his work on Hindu Law, page 432), and the same may be said of the Mahomedan Law (Tagore Lectures, 1875-6, p. 44). Upon the construction whether possession is necessary, must depend to a large extent, where the question arises, whether or not a subsequent mortgagee or alienee has had constructive notice.

Nature of notice.

When it is necessary, in applying to a company to register a transfer of shares, that the certificates should be produced, or their non-production accounted for, a mere notice of the transfer without the production of the certi-

ficates, or without their non-production being accounted for, would not amount to notice of an equitable title, such as to make the company trustees for the applicant, even if the company could be bound to take notice of trust (*Société G. de Paris* v. *Walker*, 11 Ap. Cas. 20. See also *Swan* v. *N. B. Austra. Co.*, 32 L. J. Exch. 273; *Colonial Bank* v. *Whinney*, 11 Ap. Cas. 426, 436; *Roots* v. *Williamson*, 38 Ch. D. 485.) Under the old practice in Chancery, a defendant might have successfully pleaded to a bill of discovery in aid of an action for law that he was a purchaser for valuable consideration without notice, but that privilege of absolute exemption from the obligation to make discovery has ceased to exist since the rules of the Supreme Court came into force (*Ind. Coope & Co.* v. *Emmerson*). The practice in India under the Civil Procedure Code would be the same as that observed by the Court of Chancery at the present day. *Cf.* Act XIV of 1882, ch. x, and Judicature Acts Order 31.

To whom notice must be given.

Next, as to whom the notice may be given. It may be to the party himself or to his agent; but in transactions of this kind, it is commonly the case that a legal adviser or other agent is employed, and it is clear that in this equally as in other cases of agency, a man must be concluded by a notice (whether actual or constructive) duly received by his authorized agent, to the same extent as he would have been if he had received it himself. If the purchaser employs as his solicitor the person who is also the solicitor of the seller, it is obvious that he is none the less his own agent because he is also the agent of the other party. It follows that the purchaser must then be affected by the knowledge of the seller's solicitor. It may be a question in such a case, whether, though the seller's solicitor was alone employed on the legal part of the transaction, the purchaser was not in truth his own solicitor (see *Perry* v. *Holls*, 6 Jur. N. S. 661); but if not, the fact of the agency being established, all the proper consequences follow.

It seems that Lord Chelmsford used to distinguish the notice through an agent as "imputed notice,"—a sort of variety of constructive notice. The distinction is a nice one, but not of particular importance, although it is mentioned by Fry, J., in *Kettlewell* v. *Watson* (21 Ch. D. 706).

When notice must be given.

When, then, does the knowledge of, or notice to, the agent affect the principal? It has been said that to be effective, it must be imparted, or given to the agent in the same transaction, which is clearly

the rule now in India; and that indeed the same is true as to the principal himself, since neither the agent nor the principal is bound to carry in his recollection knowledge acquired in former transactions, when the title to the present property, though it became known to him, was not then what he was dealing with. But this rule is in English law not unqualified, and in many cases it has been held that where one transaction is closely followed by, and connected with another; or where it is clear that a previous transaction is present to the mind of the solicitor when engaged in another transaction, there is no ground for restricting the rule to the same transaction. The most important, and perhaps the hardest, case in which this qualification of the rule was allowed, was that of *Fuller* v. *Bennett* (2 Hare 394). During a treaty for the sale of an estate by A to B, A made an equitable mortgage of it to C, of which notice was then given by C to the solicitors of B. The treaty for sale between A and B fell into abeyance, and A died; but more than six years after it had begun, B bought the estate, under a different agreement, from A's heir, and he, two years after that, made a legal mortgage of it to D, who, unfortunately for himself, employed B's solicitors as his on the occasion, and it was held that D was affected by the notice of C's equitable mortgage given to B's solicitors. This was no doubt an extreme case, and could not now occur in India; but our restricted rule is certainly quite capable of being made an instrument of fraud.

In *Kettlewell* v. *Mason* (21 Ch. D. 685) vendors in a Register County conveyed land to purchasers, who re-sold to a number of other persons, in building lots. The usual memorandum of the sale was registered, but the deed was retained by the vendors as it contained a receipt for the purchase-money in full, though only a small portion was paid. Numerous cases arose between the vendors and the sub-purchasers, against whom the vendors sought to enforce their lien. Fry, J., held generally, that the fact of registration did not preclude the exercise of the lien, as the deed was retained, and that fact was notice to the sub-purchasers. In one instance, where the lot was very small, it was held not unreasonable that the sub-purchaser should not have enquired for the title-deed, and consequently that constructive notice of the lien could not be imputed to him. When the case went before the Court of Appeal (26 Ch. D. 501), it was held that there was no obligation on the original vendors to register a memorial of their lien. Generally, when there is a system of registration, there would be a duty

on the part of purchasers to search the register and to enquire for the deeds therein referred to, if the registration does not set forth their contents; but here, the original vendors knew that the land was bought to be re-sold in small lots to others, and simply registering the deed enabled their grantees to sell again, as if they had full title to do so, and it was therefore held that the original vendors had, by their conduct, waived their lien as unpaid vendors.

Fraud by agent.

If the agent of both parties is himself guilty of a positive fraud, the purchaser is not affected with constructive notice of this fraud. (*Kennedy* v. *Green*, 3 My. & K. 702.) Similarly, a client is not affected by constructive notice of all the fraudulent devices that his solicitor may have recourse to. Because a solicitor cheats other people, his client is not therefore answerable for that cheating. Thus where A made an equitable mortgage to his solicitor, who afterwards assigned part of that mortgage with the deeds to B, and subsequently by fraud induced B to return the deeds, for which he substituted other worthless securities, and B did not employ another solicitor, and gave no notice of the assignment to A, who afterwards redeemed his mortgage from his solicitor, it was held that B had no recourse against A, and A had no constructive notice of the solicitor's fraud. (*Allen* v. *Southampton*, 16 Ch. D. 184.) So where the same solicitor was employed by both parties, and in collusion with one party concealed from the other the existence of a settlement affecting the estate, the latter was not affected by constructive notice of it. (*Sharpe* v. *Foy*, L. R. 4 Ch. 35).

A legal mortgagee will be postponed to a subsequent equitable title: (1) where he has assisted or connived at the fraud which led to the subsequent title, and an omission to use ordinary care in inquiring for, or in keeping the title-deeds, may be evidence of that, if not otherwise explained; (2) where he has made the mortgagor his agent to raise money, and such agent's misconduct and fraud had led to the subsequent title. But any mere carelessness or want of prudence on the part of the mortgagee will not otherwise suffice (*Northern Counties, etc.* v. *Whipp*, 26 Ch. D. 482).

But the rule that the court will not postpone a legal mortgagee to a subsequent equitable mortgagee on the ground of any mere carelessness or want of prudence does not apply as between two equitable claims. (*National Provincial B. Co.* v. *Jackson*, 33 Ch. D. 1.)

When notice is in time.

Lastly, as to when notice is in time. Notice before actual payment of all the money, although it be secured, and the conveyance actually executed; or notice before the execution of the conveyance, notwithstanding that the money be paid, is in time, and is equivalent to notice before the contract. (Sugden's V. & P. 619.)

Notice as a protection.

I now pass to the second class of cases relating to the doctrine of notice, in which a court of equity protects a *bonâ fide* purchaser for valuable consideration without notice. The principal rules in English equity may thus be stated :—If a purchaser, with notice of an equitable claim, sells to a *bonâ fide* purchaser for valuable consideration without notice thereof, the title of the latter is protected against such claim; and conversely, if one with notice of an equitable claim purchases from a person who was a *bonâ fide* purchaser for valuable consideration without notice, his title is also protected against the claim.

The case of *Taylor* v. *Blakelock* (32 Ch. D. 560) is an instance of want of notice operating to protect a transferee. C, trustee with the plaintiff of a will, and also trustee with the defendant of a settlement, having misappropriated a portion of the settlement fund, applied an equal portion of the will fund in the purchase of stock, which he transferred to the names of himself and the defendant. The plaintiff and the defendant were both innocent of C's fraud, and the defendant and the *cestui que trust* under the settlement had no notice that the stock was purchased with part of the will fund. C having died insolvent, the plaintiff sued to compel the defendant to transfer the stock to him, but the court held that the defendant, by accepting the transfer of the stock, gave up his right to sue C for the debt to the trust, and that he was therefore entitled to be treated as a purchaser for value without notice, and consequently entitled to retain the stock as part of the trust fund. But, as there is no negligence in allowing a trustee to retain all the instruments of title in his custody, a *bonâ fide* purchaser from the trustee, who alleges himself as the real owner, will not be protected. (*Carrit* v. *Real and Personal Advance Co.*, 42 Ch. D. 263).

Tacking mortgages.

In English equity law, if A is legal mortgagee of an estate, and B then takes an equitable mortgage of the same without notice of A's claim, and then C takes an equitable mortgage without notice of B's claim, and then C

afterwards purchases A's interest, he may tack his own mortgage to A's and so squeeze out or postpone B's claim to his own. This was *Marsh* v. *Lee* (1 L. C. in Eq. 659); and in one case of this kind (*Wortley* v. *Birkhead*, 2 Ves. 571), it was said that this could not happen in any other country but England, where the jurisdiction of law and equity is (or rather was) administered in different courts. This is quite true, and, as we have seen, the precaution is taken by s. 80 of Act IV of 1882, to expressly abolish the tacking of mortgages. In English jurisprudence there grew up two distinct kinds of rights, legal and equitable; and the latter, though not less real than the former, were wholly ignored by the courts of common law, while the Court of Chancery recognised both kinds; and in such a case as *Marsh* v. *Lee*, the maxim that guided the Court of Chancery was, that where the equities (or equitable claims) are equal, the law (that is, the legal right) shall prevail; and the procedure adopted was simply to abstain from doing anything, and so to leave the legal right to prevail (as it necessarily would) in the courts of common law. Similarly, in the two converse cases above stated of the purchases without notice, he who was clothed with the legal right was not interfered with. All this complicates the English cases as guides under a different system of administration; but at the bottom of the doctrine of notice, and of all the cases, as well as in Illustrations (*g*) and (*h*), there lies a principle of equity applicable in every system; and that is, that the court acts upon the conscience of the party who may have acquired a technically complete right, with knowledge, or notice of the existence in another of a prior interest, which is as substantial and real though technically imperfect, and will not suffer the forms of the law to be used as a means for defrauding the other of his money or money's value.

Grounds of the protection.

The purchaser of an equity of redemption who pays off a first mortgage with notice of a second mortgage may rightly be taken to have intended to keep alive the first mortgage for his own benefit; the contrary English doctrine in *Toulmin* v. *Steere* (3 Mer. 210) the correctness of which has lately been doubted in *Thorne* v. *Cann* (1895 A. C. 64 L. J. Ch. I) is not to be regarded as a sound rule of practice, equity and good conscience (*Gokuldoss G.* v. *Rambux*, L. R. 11 Ind. Ap. 126.)

The transferee of a first mortgagee is not affected by constructive notice that a second mortgagee, who was in possession of the house,

had taken in ignorance of the first mortgage. (*Sangster* v. *Cochrane*, 28 Ch. D. 304.)

Where a trustee, having the legal estate, takes an assignment of the equitable interest from the beneficiary, for money lent without notice of a prior incumbrance, he may use the legal estate to protect himself. The English Act as to notice to an insurance office, applies only between the insurance offices and those interested under the policy, but not to those persons *inter se*. (*Newman* v. *Newman*, 28 Ch. D. 674.)

The fusion of jurisdiction does not do away with the distinction between legal and equitable interests, and one who acquires a legal estate, without notice of a prior equitable interest, is entitled to hold against the latter. In the case of the assignment of an equitable interest in chattels, as a security, and then a subsequent pledge and delivery without notice of such assignment, the pledgee is entitled to retain as against the prior assignee. (*Joseph* v. *Lyons*, 15 Q. B. D. 280; see also *Hallas* v. *Robinson*, 15 Q. B. D. 288.)

Where a mortgagee signed a receipt for the whole sum specified but received only part, he was held estopped as against A who subsequently, without notice, acted on the receipt signed (*Bickerton* v. *Walker*, 31 Ch. D. 151; see also *National Provincial, etc.* v. *Jackson*, 33 Ch. D. 1), where there was negligence in pursuing an enquiry indicated which would have revealed the fraud.

In Illustrations (*g*) and (*h*) it would clearly be against good conscience that A, having purchased with the knowledge, or means of knowledge, which he had, should defeat the prior interest of another. Every court that administers equity acts upon the conscience, and as it is impossible to attach any demand upon the conscience of a man who has purchased for valuable consideration *bonâ fide*, and *without notice of any claim on the estate*, if A purchases without notice, his perfect right will be protected against a prior but imperfect right, but not, of course, against a prior and equally perfect right. (Sugden's V. & P. 607.) Hence, if one purchases with notice, and then sells to one who buys from him for valuable consideration without notice, the latter will be protected, for there is nothing to act upon his conscience, and the title he has acquired, being a perfect one, must prevail. So, conversely, if one purchases without notice he may sell to another for valuable consideration, though the latter has notice, for otherwise the first purchaser would be unable to deal with his property, and his perfect and *bonâ fide* title would be thus defeated.

A person who, without enquiry, takes from another an instrument signed in blank by a third party, and fills up the blanks, cannot, even in the case of a negotiable instrument, claim the benefit of being a purchaser for value without notice, so as to acquire a greater right than the person from whom he himself received the instrument. If a debtor delivers to his creditor a blank transfer by way of security that does not enable the creditor to delegate to another person authority to fill it up for purposes foreign to the original contract. (*Franc* v. *Clark*, 26 Ch. D. 257.)

There is no fiduciary relationship between a bank and its customer they stand simply as debtor and creditor. Where an auctioneer paid into his account the proceeds of sales of certain cattle, which he had sold as auctioneer on behalf of the owners, and his account was overdrawn, and the bank applied the moneys so paid in reduction of the auctioneer's account, which had been overdrawn, it was held that although the bank had notice that the moneys were the proceeds of an auction-sale, the owners of the cattle had no remedy. (*Martin* v. *Rock Eyton & Co.*, 53 L. T. R. 946). Lastly, let us take such a case as *Marsh* v. *Lee*; it is true that precisely the same facts would, under any other system, not lead to the same decision, but that is because the form of an English mortgage passes the entire legal estate, and what in English law are called equitable mortgages would, under any other system, be regarded as legally perfect pledges of the estate; and where interests in the same estate are acquired successively by different persons, then, as to the later purchaser, *caveat emptor*, and the question of notice does not arise. The leading case on the protection of a *bonâ fide* purchaser for valuable consideration without notice is *Basset* v. *Nosworthy* (2 L. C. in Eq. 1), but I do not think that it would be useful to go into the facts of any of the cases; there is hardly one that is not affected by some peculiarity of English real property law or procedure. But the general principle above indicated applies under any system of law. It necessarily assumes that the grantor, from whom the *bonâ fide* purchaser claims, had some interest which he could convey; if there was nothing that could pass to the purchaser (*Newton* v. *Newton*, L. R. 6 Eq. 135, and 4 Ch. 143), or if the grantor was himself a mere trustee for others (*Carter* v. *Carter*, 27 L. J. 74 Ch.), and much more if such semblance of title as he had, and purported to convey, was acquired by a fraud (*Eyre* v. *Burmester*, 8 Jur. N. S. 1019; *in re Morgan*, 18 Ch. D. 93) the purchaser, despite his *bonâ fides*, has no ground to stand upon.

On the other hand, where those interested in property mistake, or are ignorant of, their respective rights, and under such misapprehension a conveyance is made to a *bonâ fide* purchaser for consideration without notice, although it is discovered afterwards that these interests are different, the purchaser cannot be affected. (Sugden's V. & P. 610.) Much more, if a person having an interest in, or right to property, negligently, or culpably stands by, and permits, or encourages one to purchase the property from another,—under mistake of a fact which he can contradict,—he cannot afterwards dispute the fact in a suit against the purchaser. There must be a duty to speak, and mere silence is not enough. (Sugden's V. & P. 611-2.) For instance, where a possible future beneficiary acquiesces in a breach of trust, he will be precluded from complaining, or recovering, when his possible interest has become a real one. (*Evans* v. *Beynon*, 37. Ch. D. 328.) But in these cases it is on the ground of estoppel that the purchaser is protected against the true owner, and this though he acquired no title under his purchase. These cases of estoppel by conduct are thus quite distinct from cases of notice, such as Illustrations (*g*) and (*h*), though often confused with them. But as they are of frequent occurrence in India, I may be excused for here briefly noticing that they are all governed by the principle of natural equity, which is universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out, shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice, or something that amounts to constructive notice, of the real title; or that there existed circumstances which ought to have put him on inquiry that, if prosecuted, would have led to a discovery of it. (*Ramcoomar* v. *Macqueen*, L. R. Ind. Ap. Sup. 40; *Munnoo* v. *Lalla*, L. R. 1 Ind. Ap. 144; Ind. Evidence Act, 1872, s. 115.) Within the same category falls another large class of cases, in which the question is, which of two innocent persons must suffer through the fraud of a third; and then, if there has been negligence or other conduct on the part of one which enabled the perpetration of the fraud, the other being a purchaser for value without notice, shall not be defeated by the prior title of the former; for in such case he is estopped, by reason of such conduct, from setting up his better title.

'Settlement.'

'Settlement' means any instrument (other than a will or codicil as defined by the Indian Succession Act) whereby the destination or devolution of successive interests in moveable or immoveable property is disposed of or is agreed to be disposed of:

Words defined in Contract Act.

And all words occurring in this Act, which are defined in the Indian Contract Act, 1872, shall be deemed to have the meanings respectively assigned to them by that Act.

Settlements are instruments of every-day occurrence in English practice, but likely to be much less used in India.

Settlements are express trusts.

The illustrations above given under the definition of trusts and trustees, were limited to implied and constructive trusts, but under this definition of settlements we shall have to notice many examples of the first class of trusts, namely, express trusts, which are sub-divided into (*a*) executed, and (*b*) executory trusts. The terms of the definition need close examination.

Terms of the definition.

In the first place, the disposal of property by way of settlement under a will is excluded from the definition; there may, of course, be such a disposal, and it may be either by an executed or an executory trust, but the relief applicable in such a case under this Act is elsewhere provided. If it be an express executed trust, then s. 12, clause (*a*), and its Illustration show how relief may be obtained, and by s. 30 the provisions of ch. ii are made applicable "to directions in a will or codicil to execute a particular settlement," that is, to an express executory trust in a will by way of settlement.

Is a deed *inter vivos*.

By the definition, therefore, a settlement is an instrument executed and operating *inter vivos*. But it is an instrument that may be in its nature either executed or executory; that is, by it property may be either "disposed of" when it will be executed; or it may be only "agreed to be disposed of," when it will be executory or needing some further act or conveyance to perfect the disposal of the property.

Either executed or executory.

Destination and devolution of successive interests.

Next, it is the destination or devolution of *successive interests* in the property that is disposed of, or agreed to be disposed of; that is, it is not a disposal of an interest or benefit in favour of one person, or a body of persons concurrently, but in favour of two or more persons who take interests or benefits successively that is, one after the other, or one in substitution of the other. It is not clear what is the distinction between the *destination* and the *devolution* of successive interests; but perhaps it means that in the former, the subsequent interest is taken on the failure, or in substitution, of a prior interest; and in the latter, the subsequent interest is taken on the expiration or exhaustion of the prior interest; so that in the former the subsequent claimant takes against the prior claimant, and in the latter he takes through him.

Kinds of relief applicable.

The definition of settlements is given under this general section, because the relief applicable will vary in different cases. The usual form of relief will be that of specific performance, and in s. 23, clause (*c*), there is a provision as to the persons in whose favour the specific performance of a marriage settlement may be decreed; or the relief needed may be by way of rectification, under ch. iii, where, in Illustration (*b*) to s. 31, an example of the rectification of a settlement is given; and s. 34 shows how, after rectification, there may be specific performance of the settlement. In the case of an executory settlement, or (to use an English term) in the case of articles for a settlement, it may be necessary to seek under ch. vi for a declaration of rights, when it will generally be proper to add a prayer for the further relief of specific performance.

Classes of settlements.

Settlements may be divided and considered under two classes, namely, those supported by a valuable consideration, and those not so supported, or voluntary settlements. A further large class of cases in English law regarding a wife's equity to a settlement need not be considered as the effect of s. 4 of the Indian Succession Act (Act X of 1865), which prevents marriage operating *per se* upon the property of the parties, precludes such an equity from ever arising in India. Though disposals by way of settlement under a will are not within the definition, it may be convenient in reviewing the English cases, not to exclude all reference to such cases.

Settlements for value.

First, settlements for *valuable consideration*. Among these must be included all settlements or arrangements regarding property made in contemplation and consideration of marriage, for marriage is not merely a meritorious, but a valuable consideration; and not the parties only to the settlement, but all on behalf of whom benefits are secured, as issue yet to be born, are within the consideration, and are purchasers under the settlement; that is, they stand in the legal position of those who have given value for the benefits secured for them. (See s. 23, clause (*c*).)

In a recent case, where a marriage settlement was made, whereby the settlor's own property was transferred to trustees to pay the income to himself "during his life, or till he shall become bankrupt, or shall assign, charge or incumber the said income, or do or suffer something whereby the same, or some part thereof, would through his act, default, or by operation or process of law, if absolutely belonging to him, become vested in or payable to some other person or persons," and with a limitation over to the wife, it was held that the limitation over to the wife was valid in the event of an involuntary alienation by process of law, of the income, in favour of a judgment-creditor of the husband. (*Detmold* v. *Detmold*, 40 Ch. D. 585.)

May be executed or executory.

Where an instrument designed, for example, as a marriage settlement, is final in its character, and the nature and extent of the trust estate created thereby are clearly ascertained and accurately defined, so that nothing further remains to be done according to the intention of the parties, it is an *executed* trust or settlement (2 Story's Eq. 983). But a trust is said to be *executory* where some further act is necessary to be done by the author of the trust, or by the trustees, to give effect to it, as in the case of marriage articles, and as in the case of a will where property is vested in trustees in trust to settle or convey in a more perfect and accurate manner; in both which cases a further act, namely, a settlement or conveyance is contemplated. The leading case on this distinction is *Glenorchy* v. *Bosville* (1 L. C. in Eq. 1). It will not be useful to go into the facts of the English cases, because they are mainly occupied with the technical details of English real property law, and as to personal or moveable property are further complicated by that fruitful source of perplexity in English law (happily absent in India),—the distinction in the devolution of real and personal property, and the impossibility of moulding precisely the same estates

out of both. It will be useful, however, to state the general principles to be derived from the cases.

An executed settlement on marriage or other valuable consideration, is, of course, a contract; and the kinds of specific relief available for contracts will equally apply to such settlements.

Executory trusts by deed.

Between executory trusts under marriage articles, and executory trusts in wills, there is this main distinction: in the former, the intention of the parties may fairly be presumed, *á priori*, from the nature of the transaction, to have been the protection of, and provision for, the issue of the marriage; and hence the language of the articles will be so construed and moulded in the settlement as most effectively to carry out this intention. Thus it will not be drawn so as to leave it in the power of *either* parent to defeat at pleasure the provision in favour of the issue; but this would not apply to articles so framed that the concurrence of *both* parents is requisite, for it might well have been the intention that the husband and wife should *jointly* have such power. So it may appear on the face of the articles that limitations leaving it in the power of *one* of the parents to bar the issue, were intended by the parties in respect to a portion of the property settled (*Howel* v. *Howel*, 2 Ves. 359.) On a like principle the words in the articles as to the interests to be taken by the children, will be interpreted in the way most favourable to their beneficial enjoyment of the property; thus, whenever possible, a tenancy-in-common among them will be preferred to a joint tenancy, as the former allows (what the latter does not) use to be made, during their minorities, of their respective portions for their advancement. (*Taggart* v. *Taggart*, 1 S. & L. 88.) Similarly, in a doubtful case, an instrument will be construed rather as an executory than an executed settlement, as this may be most important to the rights and interests of the issue; or as to one part of the property comprised in it, it may be construed as executed, and as to other property merely to be executory. (2 Story's Eq. 985.)

Executory trusts by will.

But as to executory trusts in a will, there is no such presumption of intention to guide interpretation. A testator gives arbitrarily what estate he thinks fit; there is no presumption that he means one quantity of interest rather than another. The subject being mere bounty, the intended extent of that bounty can be known only from the words in which it is given; but, if it is clearly to be ascertained

from anything in the will, that the testator did not mean to use the expressions in their strict, proper, technical sense, the court in decreeing such settlement as he has directed, will depart from his words in order to execute his intention. (*Per* Grant, M. R., in *Blackburn* v. *Stables*, 2 V. & B. 369.) Hence, if the limitations of the interests given are explicitly declared by the testator, there is no authority to make them different. In executory, as distinguished from executed trusts in a will, where the directions to settle, if carried literally into effect, would be void from illegality, as where they would infringe the rule against perpetuities (s. 101, Act X of 1855) the court, in order to carry the testator's intention into effect as far as possible, or, as it is termed *cy-près*, will direct a settlement to be made as strictly as the law will permit. (*Humberston* v. *Humberston*, 1 P. Wms. 332.) The above remarks will apply when the court is acting upon s. 30 of this Act, and I have thought it useful thus to bring into close contrast the difference between an executory settlement by an instrument *inter vivos* and one under a will.

It is often a nice point to decide whether a benefit given by will is presumed to be given on an implied condition, that if taken, that already secured by a covenant before the date of the will, is to be surrendered. The doctrine is settled, that when the relationship of father and child is established between testator and beneficiary, the presumption arises that there was no intention to give double portions. In each case, however, the intention of the testator has to be discovered from the words of the will. (*Montague* v. *Earl of Sandwich*, 32 Ch. D. 525.)

In the case of *Boyes* v. *Carritt* (26 Ch. D. 531), the testator, by his will, gave all his property to his solicitor A, and though no trust were declared in the will, the testator made a verbal agreement with A that he should hold the property on trust to be declared subsequently, and to be contained on a separate piece of paper. Such a paper was written but was not executed as a will, nor was it given to A during the testator's lifetime, nor were its contents imparted to him. The court held that the contents of the paper were insufficient as a declaration of the trust, and A was declared trustee for the next-of-kin.

But a gift by will to an illegitimate child *en ventre sa mere* will not be upheld. (*In re Bolton*, 31 Ch. D. 542.) Where a testatrix created a trust of specific property in favour of such of her servants as should be in her service at her death, the trust was enforced. (*Shenstone* v. *Brock*, 36 Ch. D. 541.)

Beneficiaries under marriage settlements.

As to marriage settlements (whether executed or executory), it will be useful here to point out that s. 23, clause (*c*), provides that where the contract sought to be specifically performed is a marriage settlement, any person beneficially entitled thereunder is competent to enforce it. This will apply as much to an executory as to an executed settlement, since the one is as much a contract as the other. And this provision seems intended to dispose of a subject much discussed in English equity, namely, whether, and when, marriage articles, that is, an executory settlement, will be enforced in favour, and at the suit of mere volunteers, such as collateral relations and others who are not (as are the parents and their issue and those claiming through them) deemed to be within the scope of the consideration of the marriage, and as to whom no other special consideration can be pointed out as value given for the benefits secured to them. (2 Story's Eq. 986.) I consider that this provision brings all taking benefits, whether so-called volunteers or not, within the scope of the consideration; and, with deference, I conceive that this is not only a convenient, but the only sound solution of the difficulty.

In *Green* v. *Paterson* (32 Ch. D. 95), where there had been an imperfect execution of a post-nuptial settlement, the children were treated as volunteers, and not as purchasers.

Usual and proper powers, what are.

Lastly, it is a common occurrence to find in an executory settlement, as also in directions in a will to execute a settlement, a general clause that all *usual or proper powers* shall be inserted therein; and many cases have arisen as to what powers are within such a clause.* The distinction to be observed is between powers for the management and better enjoyment of the settled estates, which are beneficial to all parties, and which will be inserted; and powers which confer personal privileges on particular parties (such as powers to jointure, or to raise money for any particular purpose), and which will not generally be inserted.

Thus, a tenant for life has a discretion, in leasing property, as to what are proper covenants, and a lease will be void only where there is an outrageous omission of such. (*Davies* v. *Davies*, 38 Ch. D. 499.)

Powers of leasing, of sale and exchange, of varying securities, of appointing new trustees, and (where there is any joint property, or

* *Hill* v. *Hill*, 6 Sim. 144, is the principal case on the subject, and there has also been legislation in England.

there are any mines or any land fit for building purposes), powers of partition, of leasing mines, and of granting building leases, are powers for the general management and better enjoyment of the estates, and such powers are beneficial to all parties. In India difference in business and social habits may well suggest other or different powers as being *usual* or *proper*.

"Other usual powers," what.

Where some powers are specified, and a general clause as to "other usual powers" follows, the ordinary maxims on constructions as to general words being limited by antecedent particular words, and the implied exclusion of some things by the expression of others, will have to be applied to the case. Where the articles or will are altogether silent on the subject, there has been some conflict of decisions as to whether any powers can be inserted in the settlement. I decidedly incline to the course taken in the later cases (*Turner* v. *Sargent*, 17 Beav. 515; *Byam* v. *Byam*, 19 Beav. 58), and think that, unless the contrary ought to be gathered from the context, usual and proper powers ought to be inserted, as being always beneficial, and often essential, to the right management and full enjoyment of the property.

Voluntary settlements.

I pass now to the second great class of settlements, namely, *voluntary settlements*. These instruments are, as in the first class, divisible into executed and executory settlements; in the former the property has been "disposed of" by the legal title thereto being transferred to the beneficiaries, or to a trustee on their behalf, or by the settlor having expressly constituted himself a trustee for them; in the latter there has been no such transfer; it has only been agreed to be done, and something remains to be done to complete it; but in neither has there been any legal consideration adequate to support a contract. Settlements in a will, or made under directions in a will, are not to be confounded with voluntary settlements; for though everyone who claims under a will is a volunteer, in the sense that he takes by the bounty of the testator, yet a will has no operation until the death of the testator, and then every beneficiary claims under, and not against him, and stands on *his* rights as against all others. Hence the definition of settlement in s. 3 necessarily excludes all testamentary settlements. An assignment of leaseholds, in consideration of natural love and affection, has been held not to be voluntary. (*Harris* v. *Tubb*, 42 Ch. D. 79.)

General rule.

Ellison v. *Ellison* (1 L. C. in Eq. 273) is the leading case on voluntary settlements and trusts. The general rule may be briefly stated to be that an executed voluntary settlement will be, and an executory voluntary settlement will not be, enforced on the suit of the volunteers claiming under it, against the settlor and all subsequent volunteers. But the difficulty is in applying the rule, and it is surprising how many and conflicting have been the cases as to when such a settlement is fully executed.

Where there is a meritorious consideration.

With regard to a meritorious consideration, so commonly the motive in this class of settlements, it should be borne in mind that by s. 25, Indian Contract Act, an agreement made on such consideration, that is, on account of natural love and affection to near relations, if it be in writing and be registered, becomes a legal contract; and, therefore, whether executed or executory, enforceable against the settlor and all claiming under him. But if either of these formalities be wanting, and the agreement is one resting in promise, that is, merely executory, then the above general rule applies, and it will not be enforced even against the settlor. But Expl. 1 to s. 25, Indian Contract Act, shows that the validity of a gift actually made,—which includes a voluntary settlement fully executed,—is not affected by the want of these formalities as between the donor and donee; thus leaving open the question as to its validity as against a purchaser for valuable consideration with or without notice, as the case may be. Thus two questions remain for discussion: *first*, when is a voluntary settlement fully executed? and *secondly*, against whom is it then effective?

When a voluntary settlement is executed.

As to the *first* question, the settlor may have had either the legal estate of the property sought to be settled, or only the equitable estate; that is, the property may be actually vested in another as trustee for his benefit. Further, if the settlor was the owner of the legal estate, he may have sought to make the settlement in either of two ways, that is, either by means of an actual transfer, or by a declaration of trust on behalf of the intended beneficiaries.

Now, supposing that, however clear the intention to transfer may be, the acts done to this end are imperfect, then the gift will be imperfect. There have been many cases to this effect; that of *Searle* v. *Law* (15 Sim. 95) will be a good example. There A made a voluntary assignment of turnpike-road bonds, and shares in an insurance and in

a banking company to B, in trust for himself for life, and after his death for his nephew. He delivered the bonds and shares to B, but did not observe the formalities required by the Turnpike Act, and the deeds by which the companies were formed, to make the assignment effectual It was held that on A's death, B could not retain the bonds or shares against the executor of A. The court observed that if A had not attempted to assign them, but had simply declared in writing that he would hold them upon the trust expressed in the deed, this would have bound him; and what bound him would have bound his executor; that he evidently had no intention of making himself a trustee for any one, but meant the beneficiaries to take under the deed; and having omitted to make the deed an effectual assignment, no interest, legal or beneficial, had passed. With reference to this distinction, it should be noted that a declaration of trust purports to be, and is in form and substance, a complete transaction; whereas an agreement, or an attempt to assign, is in its form and nature incomplete. (*McFadden* v. *Jenkins*, 1 Hare 462.) See, however, *in re Anstis*, 31 Ch. D. 596, where a defective voluntary settlement was enforced.

A deed completed is such.

A deed conveying property, or bond or covenant to pay money, once in all respects completed, though voluntary, is not revocable; for if a man will improvidently bind himself by a voluntary deed, without reserving to himself a power of revocation, he must lie down under his own folly. (*Villers* v. *Beaumont*, 1 Vern. 100; 2 Spence's Eq. 882.) But the mere execution of a conveyance or other instrument, whether it relate to legal or equitable property, is not of itself conclusive that it was intended to take effect in all events; parol evidence may be given of the circumstances under which it was executed, and of the manner in which it has been dealt with, in order to show that it was not intended as a final and irrevocable act. (2 Spence's Eq. 883.) Hence many cases have arisen where the deed, purporting to be a complete conveyance, has been retained in the settlor's possession, which may or may not indicate an intention to reserve the power of revocation. Thus, if such a deed was made for a special purpose for which it was never required to be used, or if it was executed only as a preparatory measure, or only to take effect in case some event should happen or not, such a deed would not be a definite act, giving a complete title. But the delivery of a counterpart of the deed, or where one part only is executed, its delivery to some third person so as to put

it out of the reach of the settlor, would be evidence of an intention that it should not be revocable. But supposing the transfer to be by a conveyance to trustees for the grantees, the transaction is complete, and though the settlor should procure a re-transfer by the trustees, and should cancel the instrument, the settlement is binding. (2 Spence's Eq. 883—6.) The main difficulty is on the question whether a settlor has sufficiently constituted himself a trustee.

Where a donor had done all in his power to complete the gift, and the donee under it was entitled to possession, and the donor was still supporting the gift, it was held that such a gift was not, as against a third party, either invalid or to be set aside because possession had not been acquired by the donee. (*Kali Das M.* v. *Kanhya Lall P. etc.* L. R. 11 Ind. Ap. 218; see p. 232.)

Cases of such.

A plain example is the case of *Wheatley* v. *Purr* (1 Keen 551), where A directed her bankers to place a sum of money in the joint names of her children and of herself as trustee for them. This the bankers did, giving to A a promissory note for the same at interest on deposit, and A was held to be a trustee. A case very near the line was the well-known one of *Ex-parte Pye* (18 Ves. 140); there A directed his agent, by letter, to purchase an annuity for and in the name of G. The agent bought it, but in the name of A, who then sent him a power of attorney to transfer it into the name of G, but before this could be done, A died. It was held that the documents showed a sufficient declaration by A of his being trustee for G. Though this like many of the English cases on the subject, is not a case of settlement within our definition, yet the principle it contains would equally apply to a settlement. As was said in another case, a declaration of trust is not confined to any express form of words, but may be indicated by the character of the instrument. (*Kekewich* v. *Manning*, 1 D. M. & G. 176.)

Where the plaintiff transferred stock into the joint names of herself and the defendant, who was her godson, with an evident intention of benefiting the defendant, and the plaintiff afterwards married again and sought to compel the defendant to re-transfer the stock to her, the court held the settlement to be complete and that the defendant could not be compelled to re-transfer. Under the circumstances it was also held that there was no resulting or implied trust on her behalf. (*Standing* v. *Bowring*, 27 Ch. D. 341.) So in *Murray* v. *Flavelle* (25 Ch. D. 89), where, by an agreement between two partners, it was

provided that an annuity should be paid to the widow of either of them, it was held that a trust had been created and that the widow was entitled to the annuity, free from the claims of the creditors of the testator. Where a voluntary conveyance by gift is complete, no conditions can afterwards be annexed to such gift by the grantor; and if the condition so sought to be annexed was immoral (*e.g.*, a condition for concubinage) and so invalid, it would not affect the prior valid grant.

Cases of *choses in action.*

Many of the English cases have been complicated by the peculiar rule of English law that *a chose in action* is not assignable at law, and that consequently the action must always be brought in the name of the obligee; and so the question has arisen where the interest or right under such an instrument as a money-bond, note of hand, or policy of insurance is the subject-matter of settlement, whether enough has been done, in the particular facts of each case, to make the obligee a trustee for the donee in respect of the benefit claimable under such instrument. (2 Spence's Eq. 907.) In India we are free from such a source of perplexity, and we fall back upon the general question whether the transfer be complete either as an assignment or as a declaration of trust; the particular acts necessary for this may vary in each case, but, speaking generally, nothing must remain to be done to complete the purpose which the party has in view; and that purpose must be the complete divesting of the interest which is intended to be transferred. (2 Spence's Eq. 907.) Where the interest is an equitable one, such as we might have in India, the same general rule applies; the beneficial owner is the person to transfer it, either by assignment or declaration of trust: and it is not essential (however prudent it may be) that the original trustee should have notice or accept the new trust, for he can have no power over the disposal of such interest (*Tierney* v. *Wood*, 19 Beav. 330); nor need the new beneficiary have notice. (*Tate* v. *Leithead*, Kay 658.) If property be legally vested in A as trustee for B for life, and subject to B's life interest for C absolutely, it is competent for C, in B's lifetime, with or without the consent of A, to make an effectual settlement, by way of mere bounty of C's interest, in favour of others; and this cannot be better done than by making an assignment of such equitable interest to D as trustee for the objects of the settlement. (*Kekewich* v. *Manning*, 1 D. M. & G. 176.) Again, in such a case as where A, a few days before her death, by a voluntary

deed executed a complete and present assignment of all her property to B, we should, in India, have no difficulty, I think, in adopting the result of the decision that promissory notes, though not specified in the deed, and not indorsed over, passed to B, and this without having any need to view A as trustee for B in respect to such notes. (*Richardson* v. *Richardson*, L. R. 3 Eq. 686.)

Imperfect assignments.

But where A had the beneficial interest in certain property which was to be held for him by the trustees till he was 25, when it was to be paid over to him, and then A, after he had attained his age of 25, made a voluntary settlement of it, but the property was not transferred to the trustees of the new settlement, it was held that as it might have been transferred and was not, the settlement was an imperfect assignment, and A was entitled to have the property transferred to himself by the old trustees. (*Bridge* v. *Bridge*, 16 Beav. 315.) Again, in another case in the same court, where A had become sole trustee of certain stock to which, subject to the life interest of B, she was entitled absolutely, and then A, by deed, voluntarily assigned all her interest to B, to the intent that B should become absolute owner thereof, and afterwards A refused to execute the necessary power to transfer the stock into B's name, it was held that the assignment was imperfect, and that the transfer of the stock ought to have been made if both parties had been willing to perfect the transaction, and then B's title would have been complete. (*Beech* v. *Keep*, 18 Beav. 285.) Doubt has been cast by very high authority (Sugden's V. & P. 592) on both these decisions; but, with deference, I incline to think that, under the general rule as to voluntary settlements, they should be followed.

Notice of assignment.

Where there has been a voluntary assignment of the beneficial interest in property, it is always prudent, to say the least, for the donee to give notice thereof to the trustees in whom the property is vested; otherwise, if the trustees were to transfer it to the original beneficiary, or under his directions, the donee would have no remedy against the trustees. (*Donaldson* v. *Donaldson*, Kay 711).

Voluntary settlements when enforced.

The *second* question is, against whom is a voluntary executed settlement effective? On this we get but little aid from the English cases, as they are mostly affected by two statutes of Elizabeth. (See 2 Spence's Eq. 288.) As a voluntary settlement, which is not executed

but merely executory, is really no settlement at all, we may exclude such from the following remarks. It is expressly provided by s. 24, clause (*d*), that a subsequent purchaser, with notice of a voluntary settlement, cannot have a specific performance of his contract against the settlor; and by s. 25, clause (*c*), it is provided that after a voluntary settlement, the settlor cannot have specific performance of a subsequent contract of sale against the purchaser, and this, of course, whether such purchaser contracted with or without notice, for the want of notice is the equity of the purchaser, not of the seller. Lastly, Illustration (*g*), to s. 54, shows that a beneficiary under a voluntary executed settlement may have an injunction against the settlor, to restrain him from entering into a contract with a third person regarding the property so settled, in violation of the terms of the settlement.

Subsequent volunteers stand only on an equal equity with the prior ones, and, being posterior in time, cannot be preferred to them. The only person, therefore, as to whom a question is left is a purchaser for valuable consideration without notice of a prior voluntary settlement. If the prior settlement was not voluntary but for valuable consideration, and in regard to forms was complete, it is clear that such a purchaser could not prevail against it. If a settlement, though voluntary, yet was executed, in the sense that the settlor had thereby effectually divested himself of such interest as he intended to divest himself, then it would seem that there would have been no interest left in the settlor to pass to the purchaser, and the latter could not avail himself of his want of notice, except under the same circumstances as he might do against any other prior disposal of the property. Where an imperfect assignment of stock is followed by a voluntary settlement of the same, the latter would be upheld and enforced against the former. (*Nanney* v. *Morgan*, 37 Ch. D. 346.)

It will be convenient to add in the proper places any further remarks on s. 24, clause (*d*), s. 25, clause (*c*), and s. 54, Illustration (*g*).

Trusts for creditors.

I will here, in conclusion, only briefly refer to a class of cases which, in English treatises, are generally discussed along with voluntary settlements, namely, voluntary trusts, under which a debtor conveys property to a trustee for the payment of his creditors. Clearly they are not within our definition; and, generally, they are really trusts for the benefit of the debtor and not of the creditors, and unless the latter are parties or privies thereto, or have been thereby led to alter their position, they

have no rights against the trustee. (See, for a late case on the subject, *Johns* v. *James*, 8 Ch. D. 744.) It is to cases of this kind as distinguished from cases noticed at p. 9, that the general rule applies that one who is a stranger to a contract cannot sue upon it, though its performance might be a benefit to him; if there is not a trust constituted on his behalf, and it is a mere contract between A and B, to the consideration for which C is an entire stranger, C can have no relief upon it in any form. (See *Re D'Angibau*, 15 Ch. D. 242, and *Murray* v. *Flavelle*, 25 Ch. D. 98.)

Though the statute of Elizabeth against conveyances in fraud of creditors does not extend to the provinces in India, yet the principles thereof being in accordance with equity and good conscience will be applied so as to make such settlements void. (*Abdool Hye* v. *Mir Mahomed, etc*, L. R. 11 Ind. Ap. 10.) In *Rai Bishen Chand* v. *Mussamat Asmaida K.* (11 Ind. Ap. 164) the court upheld a completed conveyance in favour of grandsons as against creditors of the son, as not being in fraud of them, though in fact it disappointed them, and though only one grandson was in existence when it was made, and he died. (See also 9 Ind. Jur. 57.)

It will be convenient to notice the words defined in the Indian Contract Act as they occur. They are mainly such words as "contract," "agreement," "fraud," "misrepresentation," "mistake," &c.

4. Except where it is herein otherwise expressly enacted, nothing in this Act shall be deemed—

Savings.

(*a*) to give any right to relief in respect of any agreement which is not a contract;

Definition of contract.

By the Indian Contract Act, s. 2 (*e*), "every promise and every set of promises, forming the consideration for each other, is an agreement;" and by s. 10, "all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object," and then follow, in s. 11 to s. 23, explanations of all the terms used in this description; and lastly, in s. 24 to s. 30 void agreements are described and limited. I am not aware that in this Act specific relief is anywhere given in respect of a void agreement; but the object of the clause is probably to exclude from its operation

what are commonly called imperfect obligations, that is, duties imposed by religion or by positive morality, as contra-distinguished to duties imposed by positive law; and I think that it is apparent from what has been said in the preceding pages that, to give a title to relief, there must be the presence of the substantial elements, if not of all the external forms, of a legal agreement.

(*b*) to deprive any person of any right to relief, other than specific performance, which he may have under any contract; or

Alternative relief.

Thus, a person, strictly entitled to specific performance of a contract is not, therefore, compellable to seek that relief; he may, if he chooses, content himself with the ordinary relief of damages for breach of the contract; but we shall see under ch. ii this difference from English practice in the procedure of our courts, that there cannot be two suits on the same contract, first, one for specific performance, and if that fails then a fresh suit for damages; for s. 19 gives a right to pray for damages as an alternative relief, and s. 29 makes the dismissal of a suit for specific performance a bar to a fresh suit for damages. The practice in England was quite the other way, for the dismissal of a suit in equity for specific performance did not prejudice an action at law for damages, and it required legislation to enable an equity court to give in any case the relief of damages.

When a party has sued for specific performance, and in the alternative for liquidated damages, and in the interval sells the property to another, then, unless the pleadings be amended, his suit must be dismissed altogether, as he has disabled himself from granting specific performance. (*Highgrave* v. *Case*, 28 Ch. D. 356.)

(*c*) to affect the operation of the Indian Registration Act on documents.

The real object of this clause will be seen in the opening remarks on ch. ii; briefly its purpose is to exclude the course taken in a large class of English equity decisions by which the analogous enactment of the Statute of Frauds was broken in upon. But the clause does not, I consider, apply to such a case as I have suggested as falling within the principle of the Illustrations (*g*) and (*h*) to s. 3 when

considering the doctrine of notice. In such a case as is put in Illustration (*g*), the relief given to B as against A, would not be given upon B's prior but unregistered contract with the original grantor to both of them, but upon the contract of trust, which, in the circumstances, is by construction of law imposed upon A. This distinction may seem refined, but is, I think, real.

This may be illustrated by what has been held as to s. 4 of the Statute of Frauds, which precludes actions on parol contracts concerning an interest in land. The contracts are not avoided, but only the legal remedies barred. Hence results the equitable consequence of a part performance of such a contract when the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not upon the contract itself. The matter has been advanced beyond the stage of contract, and the equity results from *res gestæ*, subsequent to, and arising out of the contract; and all that is required is that the connection of those *res gestæ* with the alleged contract should be capable of being reasonably inferred from the *res gestæ* themselves. (*Maddeson* v. *Alderson*, 8 Ap. Cas. 474—6.) But it must also be borne in mind that as the contract is not avoided it remains though there is no remedy upon it; and a new contract cannot be implied from the doing of acts which were clearly done in performance of the first contract. (*Britain* v. *Rosseter*, 11 Q. B. D. 127.) This, however, is quite consistent with such acts giving an equitable ground for relief which would not otherwise have existed.

"Registration in the name of a transferee only gives complete effect to a prior valid transfer; registration does not make effectual a document which was, as between the alleged transferor and transferee, inoperative and of no effect." (*France* v. *Clarke*, 26 Ch. D. 263.) This was said of the registration by a company, of a transfer of shares, but it appears to be equally true of a public registration of a deed.

The question has arisen whether a person could obtain specific performance of an agreement of which registration was compulsory, but which had not been registered, see ss. 17 and 49, Act III of 1877. Though such a document was not registered, and was therefore inadmissible in evidence as creating an interest in land, it would be admissible for the purpose of obtaining specific performance of the agreement. (*Bengal Banking Corporation* v. *Mackertich*, I. L. R. 10 Cal. 315; *Nagappa* v. *Devu*, I. L. R. 14 Mad. 55, and cases there cited).

Specific relief how given.

5. Specific relief is given—

(*a*) by taking possession of certain property and delivering it to a claimant;

(*b*) by ordering a party to do the very act which he is under an obligation to do;

(*c*) by preventing a party from doing that which he is under an obligation not to do;

(*d*) by determining and declaring the rights of parties otherwise than by an award of compensation; or

(*e*) by appointing a Receiver.

Here clause (*a*) refers to the relief given in ch. i; clause (*b*) to that in ch. ii; clause (*c*) to the preventive relief by injunctions, and clause (*d*) to that by a declaratory decree.

Preventive relief.

6. Specific relief granted under clause (*c*) of s. 5 is called preventive relief.

Relief not granted to enforce penal law.

7. Specific relief cannot be granted for the mere purpose of enforcing a penal law.

For instance, it is no objection to an injunction that it will restrain the publication of a libel; for s. 55, Illustration (*e*), shows that such an injunction may be granted, for the real object then is to protect the the civil right of private reputation; but apart from the protection of some civil right, or the prevention of a civil wrong, the enforcing of a penal law must not be the sole object and result of the specific relief sought for.

It was held under the Presidency Magistrates' Act (IV of 1877, s. 170), which is now represented by s. 548 of the Code of Criminal Procedure, that prosecutors whose charges were dismissed by a Presidency Magistrate are entitled to copies of the orders made by, and depositions taken before, such Magistrate. In *Bank of Bengal* v. *Dinonath Roy* (I. L. R. 8 Cal. 166), the High Court held that an application to the Magistrate for such copies was not "for the mere purpose of enforcing a penal law" and that the applicant was entitled to have them.

PART II.

OF SPECIFIC RELIEF.

CHAPTER I.

OF RECOVERING POSSESSION OF PROPERTY.

(*a*) *Possession of Immoveable Property.*

THE main distinction between the relief given under this chapter and that given under ch. ii, is that where the foundation of the action is the existence of a right to the immediate possession of lands or goods, and that right need not depend upon contract; but under ch. ii the right to the relief rests entirely on contract.

8. A person entitled to the possession of specific immoveable property may recover it in the manner prescribed by the Code of Civil Procedure.

Recovery of specific immoveable property.

That is, the suit is to be brought in the ordinary course, and the decree for the delivery of the land will be executed under s. 263 of the Civil Procedure Code, or other appropriate section.

9. If any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit instituted within six months from the date of the dispossession, recover possession thereof, notwithstanding any other title that may be set up in such suit.

Suit by person dispossessed of immoveable property.

Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

No suit under this section shall be brought against the Government.

No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

This section may be considered as one of the most important in the Act. It practically reproduces s. 15 of Act XIV of 1859, and must, since the provision it contained as to limitation has been repealed by Act XII of 1891, Sch. I, Pt. I, be read with Art. 3 Sch. II of the Limitation Act (XV of 1877) which contains the same provision.

Wrongful dispossession: English rule.

The law in England is very different; there, if one is wrongfully in possession, and the rightful owner peaceably enters, he is no trespasser, but thereby acquires possession, and may bring trespass against any who continue upon the land. (*Taylor* v. *Cole*, 1 Sm. L. C. 9 5; *Butcher* v. *Butcher*, 7 B. & C. 399.) Further, he who has the freehold and the right of entry may justify a forcible entry, that is, he is not civilly liable in damages for such entry; but such entry may be an indictable offence, and for any independent wrong (as assault or injury to furniture) committed in the course of the forcible entry, damages may be recovered, even by a person whose possession was wrongful. (*Beddall* v. *Maitland*, 17 Ch. D. 174.) Such a rule, permitting an owner to enter, naturally led to much violence, and there are many old statutes against forcible entries, but it really, in its origin, was merely a device to substitute for the old forms of real actions the easier form of an action for trespass in which the title to the land might be tried. (3 *Reeve's Hist.* 202, 229, 289, 397; 3 *Bl. Com.* 214.) The more equitable rule of the Roman law (like our own) did not allow a man thus to take the law into his own hands, and to assume the advantages of possession. (*Phillimore on Juris*, 219: *Sandar's Instit., lib. IV., tit. XV.*, 6.)

Interdictum de vi.

We find here the provisions of the Roman Civil Law, with this difference that the limitation was one year instead of six months. A person wrongfully dispossessed of property could recover it on the ground of previous possession alone by an *interdictum de vi*. But if he did not make use of his special summary remedy before the expiry of a year he could only avail himself of an action for the property, in which case he had to make out his title (*Dadabhai Narsidas* v. *The Sub-Collector of Broach*, 7 Bom. H. C. Rep. A. C. 82.)

Trespasser.

In comparing the ancient Civil law with the provisions of s. 15 Act XIV of 1859, Melvill, J., in the same case points out that under the former, a plaintiff could not obtain the *interdictum de vi* unless he had a *juridical* posses-

sion, that is to say, one founded in right. And he cites Cicero pro *Cæcina*, c. 32 "ne id quidem satis est, nisi docet ita se possedisse, *ut nec vi, nec clam, nec precario possederit.*" "Thus" he continues "a mere trespasser could not have succeeded; nor could he, in my opinion, succeed under s. 15 of Act XIV of 1859. He never acquired what the law understands by possession, and cannot therefore have been dispossessed."

In *Virjivandas Madhavdas* v. *Mahomed Ali Khan* (I. L. R. 5 Bom. 221) the court held that physical detention or occupation of land, if suddenly taken and not acquiesced in, is not such a possession on which a possessory suit could be founded, and the same view of the law was taken in *Amiruddin* v. *Mahomed Jammal* (I. L. R. 15 Bom. 685). It will be noticed that these cases have incidentally established the rule that the court, even in cases under s. 9, can go into the question of title, for how can it be decided whether a person has a juridical possession without going into the question of title, however summarily?

The rule to be deducted from the decisions amounts therefore to this; that even in a suit under s. 9, the court may go into matters of title so far as they are necessary to decide whether, as between the plaintiff and the defendant, the plaintiff has a juridical possession.

When it is said that a plaintiff to succeed in a suit under s. 9 must have a *juridical possession*, it must be taken as meaning that he has such a juridical possession as against the defendant, in contradistinction to such a juridical possession against the true owner. Suppose A forcibly disposses B of a piece of land, and after a year's quiet enjoyment is in turn dispossessed by C. If A sues C under s. 9, though his possession, as regards the true owner, is simply that of a trespasser, it is a juridical possession as against C. He was in quiet enjoyment, and as regards C, he has the better title of the two, and as far as C was concerned, the latter having no right at all, he was no trespasser. And when it is said that a mere trespasser cannot succeed even in a suit under s. 9, the expression must necessarily be understood as meaning that a person who is a mere trespasser as regards the defendant in the suit cannot succeed. It would seem also to be only consonant with justice and equity that even in such a suit brought more than six months after his dispossession by C, A should be considered to have a better title than C. This question may, however, be more conveniently considered in conjunction with the discussion of the cases on the

point whether a person in an ejectment-suit may succeed on mere proof of anterior possession.

But supposing a tenant retains possession after the expiry of his term against the will of the landlord—is he not a trespasser? One would have thought so; but it has been held that such a tenant having been forcibly dispossessed by his landlord, or by the new lessee, could recover possession under s. 15, Act XIV of 1859. (*Jonardun Acharjee v. Haradun Acharjee*, 9 W. R. F. B. 513; *Sofaoll Khan* v. *Woopean Khan*, 9 W. R. 123.)

Possession.

The law is silent as to the particular kind of possession which it is necessary for a plaintiff to have, to entitle him to relief under the section. As far as the decisions go, the term has been held to include *de facto* and legal possession.

The scope of this work will not allow of a disquisition upon all the various kinds of possession known in English law. We have here to deal with the possession of immoveable property alone, meaning by the term, in general parlance, (for it is impossible to define it accurately,) that relation to property arising out of the exercise of acts of ownership over it exclusively and without contest. In reality the term "physical possession" as applied to immoveable property is a misnomer. We can understand the physical possession of a chattel, but the nature and extent of immoveable property will not allow of its *detention*. The term is however used in a popular sense and has been approved by long use.

Bentham says "to have physical possession of a thing is to have a certain relation to that thing," (*General View of a Complete Code*, Vol., III, p. 188, collected works), but beyond noticing that its existence depends both upon facts and law, he does not define the term, nor does he inform us what that particular relation is. Sir Frederick Pollock (*Possession in the Common Law*, p. 28,) describes possession as "a legal state of things importing definite and valuable rights of which the law takes notice." "The rights of a possession," he says, in continuation, "belong to him who is in possession, but one who relies on *de facto* possession as investing him with those rights and entitling him to the appropriate remedies, has to satisfy the court that he, rather than any other person, was at the time of the wrong he complains of, in a certain relation to the thing of which the enjoyment is in question." He then proceeds to point out that physical possession of a house or land is as a matter of fact an impossibility, saying

'there can only be a more or less discontinuous series of acts of dominion." (*Ib.* 30.)

Evidence of possession.

Possession is proved by acts of ownership, varying of course according to the nature of the property. It depends on mixed questions of law and fact. To constitute possession, the evidence should show specific acts of ownership, and those acts should show an exclusive exercise of dominion over the property. (*Jones* v. *Williams* 2 M. L. W. 320; *Lord Advocate* v. *Lord Blantyre*, 4 Ap. Cas. 770; *Ishan Chunder Behara* v. *Ram Lochun Behara*, 9 W. R. 79; *Jagabandhu Das, etc.* v. *Dinabandhu Das, etc.* 2 B. L. R. Ap. 30; *Siva Subramanya* v. *Secretary of State*, I. L. R. 9 Mad. 285.) A *thakbust* award of boundary is material evidence of possession, at the time it was made, (*Prahland Sen* v. *Rajendra Kishore Singh*, 11 Moo. I. A. 293.) So, survey proceedings are *primâ facie* evidence of possession at the time of the survey; but they would give rise to no presumption of possession at a date a year later than they had been made. (*Kussessor Roy* v. *Juggodishuri*, 7 C. L. R. 269.) Receipt of rent, too, is good evidence of possession; but its non-collection on a particular portion of the property is no evidence that the possession of the property was disturbed. (*Pudar Bindoo Mahantee* v. *Mohesh Chunder Sen*, 20 W. R. 183.) The latter portion of the decision in that case apparently proceeded on the principle, adopted in the English courts, that acts of ownership exercised on one portion of an estate are, as a rule, evidence of possession of the whole (*Lord Advocate* v. *Young*, 12 Ap. Cas. 544.) There are numerous other examples of evidence of possession which will be found in the reports.

Nature of possession.

Irrespective of the section, as was pointed out by Dwarkanath Mitter, J., in *Khajah Enaitollah Chowdhry* v. *Kishen Soondar Surma* (8 W. R. 386), possession for a period of sixty years and upwards is a sufficient title which no one in the world can question. Adverse possession for any period sufficient under the Limitation Act is itself a title even against the rightful owner himself; prior possession, however short, is itself a title against a mere wrong-doer. As has been previously submitted, prior possession, however short, and even though founded in trespass, is a good title as against a subsequent trespasser without any title. Take the case of chattels: A finds a ring lying in the street; he has no title to it as against the real owner who could not be sued for its recovery or convicted,

if he retook if from A. But suppose he was deprived of it by B, who had no title to it, A could sue to recover it or prosecute B for the theft.

After discussing the question of possession as title irrespective of the section, Mitter J., expresses the opinion that inasmuch as the section does not expressly say that a possessory suit founded on mere prior possession must be barred if brought after six months from the date of the dispossession, a person may recover possession on such a title even if the suit be brought after the expiry of that period, provided the defendant cannot shew a better title. This matter will be more fully treated subsequently in its proper place.

In *Tarini Mohun Mozumdar* v. *Gunga Pershad Chuckerbutty*, (I. L. R. 14 Cal. 649,) it was stated that the section only applied to cases where physical possession was disturbed by force. Accepting the term physical possession as including legal possession, the expression would seem to be correct; otherwise the right of a landlord to recover possession where his tenant had been forcibly dispossessed might be questioned; and similarly, the right of a mortgagor, when his mortgagee in possession had been ousted by a third party. It has long been established that the possession of the landlord is in the eye of the law the possession of the tenant and *vice versâ*. (*Grish Chunder Roy* v. *Bhugwan Chunder Roy*, 13 W. R. 191.) And similarly, that the possession of the mortgagee is that of the mortgagor. As between landlord and tenant, provided there is no conflict of interest between them, their possession is legally one. Either or both might sue under the section. The tenant as being the agent of the landlord, or as being actually in possession; the landlord, either on account of his agent's possession or on the ground of his interest in the land. By treating the land and the landlord's interest therein as two distinct matters, there would apparently, and quite apart from the relationship of agency, be a sufficient title for either separately, or both together, to maintain a suit under the section. It was apparently upon this principle that West, J., dealt with the question before him in *Virjivandas Madhavdas* v. *Mahomed Ali Khan* (I. L. R. 5 Bom. at p. 220.) It was there said that where the tenant was in exclusive occupation, and there was no conflict of interest between him and the landlord, that the tenant was the proper person to bring the suit, and that if the landlord wished to sue on his possessory right, he should do so in the tenant's name, though the landlord might properly sue in his own name for an injury to the reversion. The use of the words "*he or any person claiming through*

him, may by suit," etc., would seem to indicate the capability of the landlord to sue in respect of his reversion and the tenant by reason of his possession, It will be noticed, too, that the section does not say specifically that the person suing must have been in "possession," meaning thereby actual or physical possession, but it says "if any person" simply. It would thus seem to be clear, both upon authority, and on construction of the section, that the possession of the landlord, the *seisin* as it would have formerly been called, in contradistinction to the actual *possession* of the tenant, would be a sufficient title upon which to sue, if the tenant were dispossessed otherwise than in due course of law. And he could also bring the suit in his own name. In the latter case, however, the following difficulty might occur. Supposing the tenant did not sue and the landlord brought a suit in his own name by reason of his proprietary right in the land. Would the decree give possession to him or to his tenant? It appears that the court could only give possession to him who asked for it, leaving the landlord to re-instate the tenant if he so desired.

Object of the section.

The object of the Legislature in engrafting this section into the Specific Relief Act was said to be to provide a special summary remedy for that class of cases where a person in physical possession of property is forcibly dispossessed, and that it did not intend to provide that when a person was not in actual possession of property, but only in constructive possession of it by receipt of rent from tenants, and those tenants continued in occupation of it, a suit might be brought under this section for recovery of possession on the mere discontinuance of payment of rent by them. (*Tarini Mohun Mozumdar* v. *Gunga Pershad Chuckerbutty* I. L. R. 14 Cal. 649.) As has been pointed out, the use of the expression "physical possession" might lead to doubt and difficulty, and more especially in the decision of that class of cases where persons seek to recover possession of rights of fishing and ferry. The Judges apparently were only speaking to the particular fact of the case before them, and never intended that the widest meaning should be given to their remarks. One is also assisted in arriving at this conclusion when one recollects that the section expressly provides for cases when the dispossession takes place "otherwise than in due course of law" a far wider matter than forcible dispossession. In the Full Bench case of *Wali Ahmed Khan* v. *Ajudhia Kandu* (I. L. R. 13 All. 537) it is stated by Edge, C. J., at p. 539 of the report, that the section "was passed

in order to prevent persons ousting a man from possession except by due process of law, and it was intended that under the section, a suit might be brought within six months, and the person ousted be put in possession, no matter what title he had" "Its object," he says, "was to drive persons who wanted to eject a person, into the proper court, and prevent them from going with a high hand and ejecting such person." Later on he says it enables a man to come into court and be put back into possession, if, although he had no title, he was actually in possession, notwithstanding what title the other person may prove. In *Krishnarav Yashvant* v. *Vasudev Apaji* (I. L. R. 8 Bom. 371) it was explained that the object of the section was to discourage people from taking the law into their own hands, however good their title might be. In construing section 15 of Act XIV of 1859, which is reproduced in the present section, Holloway and Innes, J.J., say "it was intended, not to abridge any rights possessed by a plaintiff, but to give him the right, if dispossessed otherwise than by due course of law, to have his possession restored, without reference to the title on which he holds, and that which the dispossessor asserts." "The plain object," they say, "is to discourage proceedings calculated to lead to serious breaches of the peace, and to provide against the person who has taken the law into his own hands deriving any benefit from the process. It was intended to obviate the effect of the possible application of English law to such cases. The section is an application of the principle '*interdictum unde vi*' (Mack, Sys. 232, 234, and note *b*) and by it a possession, lost otherwise than by due course of law, is to be restored if the applicant makes demand within six months." (*Kunhi Komapen Kurupu* v. *Changarachan, K. C. Ambu* (2 Mad. H. C. Rep. 313.) The section gives a special remedy to the party illegally dispossessed by depriving the dispossessor of the privilege of proving a better title to the land in dispute (*Khajah Enaitollah Chowdry* v. *Kishen Soondur Surma* 8. W. R. 386 at p. 389.)

In a suit for possession under this section, brought against a mortgagor by a mortgagee who has been forcibly dispossessed by the mortgagor, it is no answer to allege that the mortgage and possession under it were obtained by fraud of the mortgagee. It having been established that the plaintiff was forcibly dispossessed, he should be restored to possession. The mortgagor must seek his proper remedy in bringing a suit to have the mortgage set aside and possession restored to him. (*Sayaji* v. *Ramji*, I. L. R. 5 Bom. 446). It is thus

established that mere anterior possession is a sufficient title to entitle a plaintiff to the special relief under the section as between him and his wrongful dispossessor, provided, however, that a mere trespasser cannot be said to have such a possession as would benefit him in the same way.

Mere possession as title in title suits.

The next point for consideration is whether in a suit, brought after six months from the date of possession, the plaintiff can succeed on proof of prior possession alone, without showing title. Until very recently the decisions upon the point were of a conflicting nature, it being held in some cases that section 9 of this Act barred a person from recovering possession upon the mere ground of prior possession, unless the suit were brought within the period of limitation, and in other cases, that the existence of the summary remedy in the section did not deprive a person of the right he would have had under the English law of obtaining possession, in an ejectment-suit, on proof of prior possession alone.

Though the point seems to have been finally settled by the Privy Council in the recent case of *Ismail Ariff* v. *Mahomed Ghous* (I. L. R. 20 Cal. 834) it will not be a waste of labour to consider the various rulings upon the matter and point out the differences of opinions that existed. One of the first cases of importance was *Khajah Enaitollah Chowdhry* v. *Kishen Soondur Surma* (8. W. R. 386), which was decided in the year 1867, and in which the law on the subject was most ably and exhaustively treated by Dwarkanath Mitter, J. In that suit, which was brought more than six months after the date of dispossession, the plaintiff sought to recover possession of a *jalkur* (fishery right) on the sole ground of possession and illegal dispossession, without any proof of title, and the court held that he could obtain recovery of possession. In an earlier case (*Jadubnath* v. *Ram Soondur Surma*, 7 W. R. 174) it was also held that a person who had been wrongfully dispossessed could recover possession on his bare title of possession in a suit brought more than six months after his dispossession. Explaining this case in *Khajah Enaitollah Chowdhry* v. *Kishen Soondur Surma* (8. W. R. at p. 389), Dwarkanath Mitter, J., says, "The illegal dispossession being established, the wrong-doer should be called upon to prove his title. If he fails to do so, then the plaintiff is entitled to a decree. If, on the other hand, he succeeds, the plaintiff should *then, and not till then*, be called upon to prove a better title."

In the case of the *Zemindar of Ramnad* v. *the Zemindar of Yetthiapooram* (10 Moo. I. A. 47) which was a suit for the recovery of possession of property, brought six months after dispossession, neither party made out any clear title. The plaintiff was only able to establish that he had possession of the property, at the time of, and prior to the dispossession, yet the Privy Council held that his mere title of anterior possession should prevail. It must be noticed that the plaintiff established the fact that he had been in possession for 18 years previous to the dispute. As Mr. Justice Dwarkanath, however, points out, this finding had been arrived at upon an issue as to which party was in possession immediately prior to the date of the dispossession.

In *Kawa Manji* v. *Khowaz Nussio* (5 C. L. R. 278) which was a suit for the recovery of possession of land after declaration of title, the plaintiff proved that he was in possession, and that he had been forcibly dispossessed by the defendants, and the defendants were unable to give any proof of their title to oust him, or of their superior title to the land. Morris, J., whose opinion as the senior Judge prevailed, held that the plaintiff could succeed on his mere proof of possession, and that the special remedy provided by section 9 of the Specific Relief Act did not affect or alter the general law on the subject. Prinsep, J., however, expressed the opinion that the plaintiff could not succeed. After pointing out the special nature of the remedy afforded by section 9, he cited the case of *Kunhi Komapen Kurupu* v. *Changara Changarachan, K. C. Ambu* (2 Mad. H. C. Rep. 313) as showing that the plaintiff, by bringing his suit under the section, "obtains all the advantages of being a defendant, and of having the presumption in favor of his having a good title which sec. 110 of the Evidence Act expressly gives to one who is in possession of the land." His Lordship then discusses the cases of *Khajah Enaitollah Chowdhry* v. *Kishen Soondur Surma* (8 W. R. 387) and *Dabjee Sahoo* v. *Shaik Tumeezooddeen* (10 W. R. 102), and in disagreeing with the conclusions at which they arrive draws attention to the fact that they were decided before the Evidence Act of 1872 was enforced. In dissenting from the view taken by Morris, J., his Lordship relied upon the cases of *Dadabhai Narsidas* v. *The Sub-Collector of Broach* (7 Bom. H. C. Rep. A. C. 82) and *Lakshmibai* v. *Vithal Ramchundra* (9 Bom. H. C. Rep. 53). In the former of these cases Melvill, J., says at p. 86, that as the law in India gives a person who is dispossessed of property a remedy which he would not possess under the English law, a plaintiff

in a suit brought six months after his dispossession, must recover by the strength of his own title, and that if he "does not choose to avail himself of this special remedy given by the Legislature, he has no claim to the advantages it would now secure to him." As has been noticed, however, by Sargent, C. J., in *Krishnarav* v. *Yashvant Vasudev Apaji Ghotikar* (I. L. R. 8 Bom. at p. 375) this opinion of Melvill, J., is merely an *obiter dictum*. In *Lakshmibai* v. *Vithal Ramchandra* 9 Bom. H. C. Rep. 53) Westropp, J. (at p. 55) concurs with Melvill, J., in *Dadabhai Narsidas* v *The Sub-Collector of Broach* (7 Bom. H. C. Rep. 82) that "the law has fixed a period of limitation within which a party may recover possession without proof of title. If he allow that period to elapse, he must prove his title."

The English law always allowed a plaintiff to recover possession in a title suit on mere proof of possession, if the defendant showed no better title, so the only advantage given to plaintiff in India by section 9 is the precluding of the defendant from showing title. It would appear that if a plaintiff did not avail himself of the special remedy of the section it only puts him at this disadvantage, that is to say, that if he brings his suit more than six months after dispossession, the defendant is enabled to shew, if he can, that he has a better title. If the Legislature had intended by section 9 to bar suits not brought under it when the plaintiff only relied on his title of possession merely, nothing could have been more simple than an express enactment to that effect. But the law is silent on the point, and if it be argued that the existence of section 9 would be practically useless if it was not intended to bar such suits, if not brought within six months from the dispossession, it may well be answered that the provision of the section, that is to say, the precluding of a defendant from shewing title is its special remedy, leaving untouched the general law which allows a person to obtain recovery of possession on mere proof of anterior possession. The person who files his suit within six months gains this enormous advantage: he prevents the defendant from shewing title—If he delays and files his suit after the special period, he loses that benefit, and may be defeated by his adversary showing a better title than his mere possession.

Again, in *Mohabeer Pershad Singh* v. *Mohabeer Singh* (I. L. R. 7 Cal. 591) Garth, C. J., held that the remedy by a possessory action which is now provided by s. 9 of the Specific Relief Act has not "the effect of doing away with the English rule that possession is

primâ facie evidence of title." In *Pemraj Bhavaniram* v. *Narayan Shivaram Khisti* (I. L. R. 6 Bom. 215) the Full Bench also held that possession is a good title against anyone but the rightful owner, and entitles the possessor to maintain ejectment against any other person than such owner who dispossesses him. That rule was held applicable when the plaintiff, alleging title by conveyance, and also relying on possession, failed to prove his title but proved his possession. With regard to the latter point, the court cited with approval the Full Bench decision of the Calcutta Court in *Radha Pyari* v. *Nabin Chundra* (5 B. L. R. 708, 712). At the same time it expressed its disagreement with the decisions in *Rajkrishna* v. *Bai Itcha*, (a note of which is given at p. 224, I. L. R. 6 Bom.) and *Rassonada* v. *Sitharama* (2 Mad. H. C. Rep. 171). In these cases it seemed to have been held that a person could not recover on the mere title of possession except in a possessory suit; but it does not appear that the legal question of possession was considered by the Judges.

In a later case (*Krishnarav Yashvant* v. *Vasudev Apaji Ghotikar*, I. L. R. 8 Bom. 371) the Bombay Court (Sargent, C. J., and Kemball, J.) concurred in the Full Bench decision in *Pemraj Bhavaniram* v. *Narayan Shivaram* (I. L. R. 6 Bom. 215) and dissented from the earlier case of *Dadabhai Narsidas* v. *The Sub-Collector of Broach* (7 Bom. H. C. Rep. A. C. 82). Their Lordships after reciting the disputed passage from the judgment of the Privy Council in *Wise* v. *Amerunissa Khatun* (which is more fully mentioned later on), point out that in the Privy Council case, "the Government was entitled to take possession of the lands in question which originally formed as an island, and were at their first formation surrounded by water which was not fordable, and was entitled to oust the plaintiffs who were trespassers, and to put defendants in possession." The Allahabad Full Bench, too, in *Wali Ahmad Khan* v. *Ajudhia Kandu* (I. L. R. 13 All. 537) also approve of this distinction. Their Lordships are represented in the report as agreeing with the Calcutta Full Bench in *Ertaza Hossein* v. *Bany Mistry* (I. L. R. 9 Cal. 132) that the above passage in the judgment of the Privy Council is not to be understood as laying down "that a plaintiff is precluded from relying on his possession against a trespasser by the circumstances of his not having availed himself of the above Act." It appears, however, that *Ertaza Hossein* v. *Bany Mistry* was not decided by a Full Bench, and so far from the Judges in it interpreting the Privy Council judgment as

they are represented as doing, they seem, as a matter of fact, to have done exactly the contrary.

The Allahabad Full Bench, too, in *Wali Ahmad Khan* v. *Ajudhia Kandu* (I. L. R. 13 All. 537) adopted the view that the section does not bar a person who has been ousted by a trespasser from the possession of immoveable property to which he has merely a possessory title from bringing a suit in ejectment on his possessory title, after the lapse of six months from the date of his dispossession.

The vexed question seems now to have been definitely settled by the Privy Council in *Ismail Ariff* v. *Mahomed Ghous* (I. L. R. 20 Cal. 834). In this case the judgment of Garth, C. J., in *Mohabeer Pershad Singh* v. *Mohabeer Singh* (I. L. R. 7. Cal. 591) and of Pigot, J., in *Purmeshur Chowdhry* v. *Brijolall Chowdhry* (I. L. R. 17 Cal. 256) and the judgment of Westropp, C. J., in *Pemraj Bharaniram* v. *Narayan Shivaram Khisti* (I. L. R. 6 Bom. 215) were cited before their Lordships, and it was pointed out that Pigot, J., in the case above-mentioned, although deciding the other way, had expressed the opinion that the other two cases were correct. The Privy Council held that section 9 did not bar a plaintiff from suing six months after his dispossession on the ground of mere anterior possession, and that in such a suit his title of mere possession was certainly good as against a defendant who had no title, and that if the plaintiff in such a case proved possession, it was sufficient without his being obliged to establish title.

This exhausts the cases affirming the principle that section 9 is no bar to a suit founded on mere possession brought after six months from the date of dispossession. The contrary view is expressed as correct by Prinsep, J., in *Kawa Manji* v. *Khowaz Nussio*, 5 C. L. R. 278, which has been fully dealt with, and it will be remembered that Morris, J., whose decision prevailed as the senior Judge, took the affirmative view. The principle was also adopted in *Kunhi Komapen Kurupu* v. *Changara Changarachan*, *K. C. Ambu* (2 Mad. H. C. Rep. 313) and in *Dadabhai Narsidas* v. *The Sub-Collector of Broach* (7 Bom. H. C. Rep. A. C. 82) and in *Lukshmibai* v. *Vithal Ramchandra* 9 Bom. H. C. Rep. 53. In *Debi Churn Boido* v. *Issur Chunder Manji* (I. L. R. 9 Cal. 39) the Court (Prinsep and O'Kinealy, JJ.) held that when a person in an ejectment-suit proves merely that he was in possession at some time within twelve years previous to filing his suit, he cannot obtain possession, and that such evidence is not sufficient to throw the

onus of proving title to the land on the defendant. Their Lordships expressed the opinion that the decision of the Privy Council in *Wise* v. *Ameerunissa Khatun* concluded the point "that land to which a plaintiff is unable to make out a title cannot be recovered on the ground of previous possession merely, except in a suit under s. 15 Act XIV of 1859, now s. 9 of the Specific Relief Act (I of 1877) which must be brought within six months from the time of dispossession." The same view of the law was taken by Tottenham and O'Kinealy, JJ., in *Ertaza Hossein* v. *Bany Mistry* (I. L. R. 9 Cal. 130) and in that case, too, was the decision based on the ground that the Privy Council in *Wise* v. *Ameerunissa Khatun* had held "that mere possession would not prove any title and would not entitle a plaintiff to obtain a decree for recovery of possession except under the special statute."

In the later case of *Purmeshur Chowdhry* v. *Brijolall Chowdhry* (I. L. R. 17 Cal. 257) which has already been mentioned, Pigot and Rampini, JJ., held that mere possession would not entitle a plaintiff to obtain a decree for recovery of possession except under s. 9 of the Specific Relief Act which must be brought within six months of the dispossession. Mr. Justice Pigot, however, who delivered the judgment of the court, after pointing out the differences of opinion between the old cases of *Khajah Enaitollah Chowdhry* v. *Kishen Soondur Surma* (8 W. R. 389); *Mohabeer Pershad Singh* v. *Mohabeer Singh* (I. L. R. 7 Cal. 591; 9 C. L. R. 164) and *Pemraj Bhavaniram* v. *Narayan Shivaram Khisti* (I. L. R. 6 Bom. 215) on the one hand, and the decisions in *Ertaza Hossein* v. *Bany Mistry* (I. L. R. 9 Cal. 130); *Debi Churn Boide* v. *Issur Chunder Manji* (I. L. R. 9 Cal. 39); and *Kawa Manji* v. *Khowaz Nussio* (5 C. L. R. 278) remarked that "were it not undesirable to disturb recent and established cases" he would follow the former cases; in fact that he would have decided in the contrary way but for this reason he gives.

Having noticed the cases on the question of mere prior possession as title in non-possessory suits it may here be advisable to consider the case of *Wise* v. *Ameerunissa Khatun* (L. R. 7 I. A. 73) and point out those passages in the judgment which have caused such opposite and irreconcilable interpretations. That was a suit relating to certain distinct plots of alluvial lands that had been thrown up as *churs*, or islands, by a river. The plaintiffs claimed them as re-formations of original lands of their own and alleged that they were in possession. As to certain portions of the lands they alleged that their right was estab-

lished by previous adjudication, and as to the remainder, that they had been rightfully in possession of them as re-formations. It appeared that when the *churs* were first formed the plaintiff had been maintained in possession by the criminal courts. A year or two after they had been so put in possession, the defendants, other than the Government, had filed suits against the plaintiff, and possession of a share of these plots had been decreed to them; but the plaintiff remained in possession of the remaining share of the plots; subsequently, the plaintiff was ousted by Government from the share he held, and that land was settled with the defendants. Inasmuch as the Survey authorities had so far settled the lands with the defendants, and they had been put into possession under an order of a Magistrate under the Criminal Procedure Code, the Government of India and the persons so put in possession were made defendants. It was held that the Government were entitled to take possession of the *churs* and that the plaintiffs were trespassers. Although the plaintiffs had been in possession for about ten years before the Government ousted and put the defendants into possession it was held that the plaintiffs had acquired no title by prescription. At p. 80 of the report their Lordships say: "It is quite clear that the plaintiffs have failed to make out a title. The defendants were put into possession by the Government, who were entitled to the lands, and they were ordered by the Magistrate under the Code of Criminal Procedure Code to be retained in possession. *If the plaintiffs had wished to contend that the defendants had been wrongfully put in possession, and that the plaintiffs were entitled to recover on the strength of their previous possession without entering into a question of title at all, they ought to have brought their action within six months under section* 15 *of Act XIV* of 1859." Their Lordships then quote the following opinion of the High Court with approval. "Further, *de facto* possession having been given to the defendants under section 318 of the Code of Criminal Procedure, in accordance with the Deputy Collector's award, the plaintiff will not be entitled to a decree until and unless he can show a better title to these lands than the defendants. The fact that the plaintiffs possession as regards B, C, and D (the plots from which plaintiffs were ousted by Government) was confirmed under Act IV of 1840, and that the defendants Nos. 2 and 3 unsuccessfully endeavoured to disturb them by regular suit, does not bar the right of Government. Section 2 of Act IV of 1840 only effects persons concerned in the dispute. *But lands to which he is unable to make out a title cannot be recovered*

on the ground of previous possession merely, except in a suit under s. 15 *of Act XIV of* 1859 *which must be brought within six* months from the time of dispossession." Their Lordships held "that independently of the title of Government to the lands which appear originally to have been formed as an island in the bed of the river, possession for three years under an order of a Magistrate in a proceeding under Act IV of 1840 does not create a title by prescription."

In short, the differences of opinion that exist, or rather that existed, as to the meaning of the Privy Council in *Wise* v. *Amerunissa Khatun* amount to this. In *Debi Churn Boido* v. *Issur Chunder Manji* (I. L. R. 9 Cal. 39) and *Ertaza Hossein* v. *Bany Mistry* (I. L. R. 9 Cal. 130) it was expressly held that the intention of the Privy Council in the italicised portion of its judgment was to state that section 9 of the specific Relief Act barred suits brought after six months from the dispossession, on a possessory title alone. The other authorities cited above, without expressly explaining the meaning of the Privy Council, deny that it has that intention, and suggest that the *dictum* goes no further than pointing out that the plaintiff, if he does not bring his suit within six months loses the advantage he would otherwise have obtained of preventing the defendant from shewing any title whatever. It is naturally impossible to reconcile these conflicting views.

Immoveable property.

By section 2, sub-section 5 of the General Clauses Act (I of 1868) "immoveable property" is defined to include "land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth." By section 2 this is the meaning to be attached to the term "unless there be something repugnant in the subject or context."

The expression is not defined by the Specific Relief Act, and so in cases where recovery of possession of fishery rights is sought to be obtained under this section, the important question arises whether the conception of such rights as "immoveable property" is repugnant to the subject or context of the Specific Relief Act.

Incorporeal rights over real estate, strictly speaking, cannot be the subject of posesssion, but when they "consist in or admit of exclusive enjoyment, the *de facto* exercise of them is analogous to possession and is protected by the same remedies." (Pollock on *Possession*, p. 35).

There is an irreconcilable conflict of decisions as to what may be included in the term *immoveable property* in the section. In Bengal, the law is established from the most recent cases that a suit for the possession of a right to fish in a *khal* the soil of which does not belong to the plaintiff, does not come within the section and is not an interest arising out of land (*Fadu Jhala* v. *Gour Mohun Jhala*, I. L. R. 19 Cal. 544; *Natabar Parue* v. *Kubir Parue*, I. L. R. 18 Cal. 80). In the former of these cases, which was decided by a Full Bench of the court, the whole subject is most exhaustively treated. In Bombay, however, such a right has been held to be a benefit arising out of land (*Bhundul Panda* v. *Panda Pos. Patil*, I. L. R. 12 Bom 221). And in Madras, a right of ferry has been held to be immoveable property, or an interest therein within the meaning of the section (*Krishna* v. *Akilanda*, I. L. R. 13 Mad. 54). In those cases where rights of fishery and ferry have been held to come within the section, the courts, broadly speaking, have usually arrived at their conclusions upon the basis that although the Legislature, in the Criminal Procedure Code, distinguish between *immoveable* and *tangible immoveable* property the expression has not been restricted in this Act to its more narrow limit.

Pleas in defence.

The defendant in a suit under the section is not allowed to set up any title. That is to say, provided the plaintiff can allege a mere anterior juridical possession. If the plaintiff's possession is that of a trespasser merely, the defendant may shew title. From the use of the words "any other title," Dwarkanath Mitter, J., in *Enaitollah Chowdhry* v. *Kissen Soondur Surma* (8 W. R., at p. 390) understood an indication "that possession is itself a title in the eye of the law which requires to be superseded by a better one." It is no defence on the part of the dispossessor to say that he was acting as agent for a third person. The person dispossessed has a remedy in such a case against the actual dispossessor in the first place, though he may sue all or any of the principals. (*Virjivandas Madhavdas* v. *Mahomed Ali Khan*, I. L. R. 5 Bom. 208). Nor is it any answer, in a suit for possession brought under the section against a mortgagor, by a mortgagee who has been dispossessed by the mortgagor, for the latter to allege that the mortgage and possession under it were obtained by fraud of the mortgagee. The plaintiff being dispossessed, he must be restored to possession. The defendant must make use of his remedy by suit to have the mortgage set aside and possession restored to him. (*Sayaji* v. *Ramji*, I. L. R.

5 Bom. 446). Nor is it a bar to a suit that a Magistrate has made an award in favor of the defendant under section 145 of the Criminal Procedure Code, *Chytun Chunder Roy, in re.* 20 W. R. 12. But on the principle of *res judicata*, a defendant could rightly contend that the plaintiff's suit was not maintainable when it had been dismissed for want of appearance. Such a dismissal would amount to a final hearing and decision. (*Ramchunder* v. *Bhikibai*, I. L. R. 6 Bom. 477).

Decree for possession.

By virtue of a decree for possession of land, the decree-holder is also entitled to any crops growing upon the land. (*Shirajdee Pramanick* v. *Emam Buksh Biswas*, 13 W. R. 104). Where in a suit under this section, the plaintiff has obtained a decree for possession, and then sues the defendant to recover mesne profits collected by the latter while he was in adverse possession, the plaintiff's decree in the possessory suit is sufficient *primâ facie* evidence of his title to warrant a decree in his favor for mesne profits, unless the defendant can prove a better title. (*Radha Churn Ghuttuck* v. *Zumuroonnissa Khatun*, 11 W. R. 83).

Review.

An application for a re-hearing under the Civil Procedure Code s. 108, is not prohibited. So, upon good grounds being shown, a case which has been decided under this section may be re-heard by the court. Such a re-hearing is not a review. (*Andrew Anthony* v. *Rev. J. M. Dupont*, I. L. R. 4 Mad. 217; see also *Omar Chand Mahatta in re.* 11 W. R. 229.)

Costs.

In suits under this section it lies in the discretion of the court to award costs if it thinks fit or not. *Radho Kristo Chaklanuvis* v. *Baboo Kalee Prosunoo Roy* (15. W. R. 268.)

(*b*) *Possession of Moveable Property.*

Recovery of specific moveable property.

10. A person entitled to the possession of specific moveable property may recover the same in the manner prescribed by the Code of Civil Procedure.

EXPLANATION I.—A trustee may sue under this section for the possession of property to the beneficial interest in which the person for whom he is trustee is entitled.

EXPLANATION 2.—A special or temporary right to the present possession of property is sufficient to support a suit under this section.

Grounds essential to relief.

The object of this section is to provide a specific relief which might be had in equity, and was, in a measure, obtainable at law in England by the action of detinue, and in a more imperfect manner by the action of trover. Cases similar to those given in the Illustrations will be found in English treatises on torts and *nisi prius* law under the heads of "conversion" and "detention," but in using such cases the technical peculiarities of the old forms of action must be borne in mind. The relief sought is the specific recovery of chattels wrongfully detained from the person entitled to the possession; and to this may be added a claim for the damages occasioned by the wrongful detainer. In English law, the defendant had, or was assumed to have, come lawfully into possession, as by delivery or finding; (see Stephen on *Pl.* (5 ed. 38), but as the gist of the action is the wrongful detention of goods, it is, in substance as well as in form, an action for a wrong independent of contract (*Bryant* v. *Herbert*, 3 C. P. D. 389), and the true cause of action being the wrongful detention; it is immaterial whether the goods were obtained by the defendant by lawful means, as by a bailment or finding, or by a wrongful act as by a trespass or conversion. (1 Chit Pl. (7 ed.) 137; Bullen and Leake, 185; *Bryant* v. *Herbert, supra*). The injury complained of is not the taking (as it is in trespass), nor the misuse and appropriation of the goods (as it is in trover or conversion), but only the detention. The plaintiff may have a special or general property in the subject-matter, but must have a right to the immediate possession. As the object is to recover the specific goods, they must be ascertained and capable of identification, and the nature of the things must continue without alteration; this relief cannot, therefore, be sought for a sum of money or a quantity of grain, unless they be specifically distinguished from other property of the same kind, as by being placed in a bag or sack. (1 Selw N. P. 661.) The detention necessary is an adverse or wrongful detention. It must be proved that the defendant withholds the goods and prevents the plaintiff from having the possession of them. Hence there should generally be evidence of a request on the part of the plaintiff to have the goods delivered to him, and a refusal to deliver on the

part of the defendant. A defendant, having the goods in his possession is not, by reason thereof, bound to seek out the plaintiff and send them to him; the plaintiff should come for them. It may very well be that though the goods are the plaintiff's, the possession of the defendant does not become wrongful until there has been a demand and refusal to deliver.

In a case between lessor and lessee where the latter found in the soil a prehistoric boat of special value and claimed to keep it as lessee, the lessor's title to recover in specie was enforced (*Elwes* v. *Brigg Gas Co.*, 33 Ch. D. 562.)

To what cases applicable.

This form of specific relief is, therefore, applicable only where the goods themselves are recoverable, and the mode in which defendant's possession was acquired is disregarded; and the relief sought is consequently limited to the delivery of the goods, and any special damage for their detention. But if the goods have from any cause ceased to be recoverable, and the relief sought is either for their wrongful taking and consequent loss, or for the misappropriation of the goods, however their possession was at first acquired, then it is a pure case of trespass or conversion (as the case may be) and the only relief applicable is the ordinary one by damages (see and compare forms plaints 96-98, in Schedule 4, Civil P. Code.)

Decree, form of.

The decree for this specific relief will be as provided in s. 208, Civil Procedure Code, and will be enforced under s. 259, Civil Procedure Code and, where necessary, special damages for the wrongful detention may be added to and recovered under the decree.*

What title suffices for relief.

The two *Explanations* added to this section are merely for the purpose of showing the kind of title to possession which is sufficient. It is immaterial whether the person "entitled" to the present possession has ever yet had possession; it may be that the goods were never taken out of his possession, but if he has acquired a title to their present possession, it is enough to found the action. A trustee has the fiduciary ownership, and though it may be a barren title, yet he is entitled to possession even as against the person who has the immediate beneficial interest.

* On the measure of damages in cases of this kind, see remarks at the close of this section.

It will be convenient to take the Illustrations in order.

(*a*) A bequeaths land to B for his life, with remainder to C. A dies. B enters on the land, but C, without B's consent, obtains possession of the title-deeds. B may recover them from C.

Right to custody of deeds.

There are numerous English cases in equity compelling actual delivery of deeds to persons legally entitled to them; at law the remedy was altogether defective.

Thus in *in re Cowin* (33 Ch. D. 179) the right of a *cestui que trust* to the production and inspection of the title deeds was affirmed. In *Wright* v. *Robotham* (33 Ch. D. 106) the plaintiff, under a settlement and after the death of the settlor, became entitled to part of the property, and the settlor's heir at-law to the rest. The latter could not be found, and the settlor's solicitors held the deeds. It was held that the plaintiff was not entitled to the deeds without the concurrence of the heir-at-law, but that he was entitled to inspect and copy them.

In the Illustration, the tenant-for-life is assumed to have the legal estate; if he had only an equitable estate, the trustees would be the persons entitled to possession of the title-deeds, for the benefit of all parties interested. (*Duncombe* v. *Mayer*, 8 Ves. 320.) The relief given here applies only to unexceptionable deeds or instruments, and thus differs from the relief given under ch. v in the case of void or voidable instruments.

General rule.

Generally, the right to the possession of title-deeds follows the right to the land, and the legal tenant-for-life in possession is entitled to their custody. If A sells land to B and gives him forged title-deeds, and then deposits the real deeds with C, as security for a loan, B is entitled to recover the deeds from C. (*Leathes* v. *Leathes*, 5 Ch. D. 221; *Newton* v. *Beck*, 3 H. & N. 220; 27 L. J. Exch. 272.) Pending a suit regarding an estate, the custody of the deeds does not depend on the question who has the legal right to them, but on the question what custody is most convenient for the purposes of the suit. (*Stanford* v. *Roberts*, L. R. 6 Ch. 307.) There is no certain rule as to the custody of deeds among joint tenants or coparceners; it is rather a question of convenience, and what is for the benefit of all. (*Elton* v. *Elton*, 6 Jur. N. S. 136.) Whoever obtains possession of them may retain them; but still, on proper occasions, a co-tenant may compel their production. (*Lambert* v. *Rogers*, 2 Mer. 489; Sugden's V. and P. 369.) The like

relief will be applicable to other instruments, as securities for money, policies of insurance, bonds, and promissory notes.

Where the title to the possession of deeds and other writings depends upon the validity of the title of the party to the property to which they relate, and he is not in possession of that property, and the evidence of his title to it is in his own power, or it does not depend upon the production of the deeds or writings of which he prays delivery, he must first establish his title to the property before he can come for a delivery of the deeds. (1 Story Eq. 703.)

When terms may be imposed.

A person may be entitled to have title-deeds or other instruments delivered up to him, and yet it may be equitable to impose terms upon him in so doing; thus if an heir-at-law is entitled to hold the deeds as against a jointress, they should not be given up to him except upon the terms of confirming the jointure. So, it has been held that a subsequent mortgagee without notice and in possession of the title-deeds, will not be compelled to deliver up the deeds to the first mortgagee unless upon the terms that the latter will pay him his mortgage-money. (1 Story Eq. 707.) In giving relief under this section, our courts, as courts of equity, may well act upon this principle, and compel the doing of equity in like cases. Connected with this subject is another equity recognised by English courts, and which may be noticed here. A person having a limited or ulterior interest in property, though not entitled to the immediate possession of the deeds, may yet, in many cases, be entitled to have the deeds secured for his benefit, or to have the deeds produced for inspection and copying. It is a discretionary jurisdiction, and there is no absolute right; but to found it, it must clearly appear that there is danger of a loss or destruction of the title-deeds in the custody of the person possessing them; and also that the interest of the plaintiff is not too contingent or too remote to warrant the relief (1 Story Eq. 704; *Lemptser* v. *Pomfret*, 20 Beav. 405; *Jenner* v. *Morris*, L. R. 1 Ch. 603; *Leathes* v. *Leathes*, 5 Ch. D. 221; Sugden's V. and P. 369, 371 (*n*).) Clearly in India such a relief might be of the utmost value to those in remainder in some cases; and though I am not aware of any express provision on the subject, yet as a tenant-for-life may rightly be regarded as holding the deeds not only for himself, but also as trustee for those in remainder, a vested remainder-man would be entitled to such relief, which, in many cases at least,

Right to have deeds secured.

might be worked out by means of an injunction under s. 54, by restraining the tenant-for-life from dealing with them in violation of his duty as such trustee.

(*b.*) A pledges certain jewels to B to secure a loan. B disposes of them before he is entitled to do so. A, without having paid or tendered the amount of the loan, sues B for possession of the jewels. The suit should be dismissed, as A is not entitled to their possession, whatever right he may have to secure their safe custody.

This is an example from the law of bailments, showing that the owner of property is not always entitled to the immediate possession of it. Here, though the bailee, by his wrongful act, has entitled the bailor to terminate the bailment, and meanwhile has thereby become liable for loss for which in ordinary course he would not have been liable, yet the bailor must tender payment before he can be entitled to immediate possession of the pledge.

Bailee against bailor.

(*c.*) A receives a letter addressed to him by B. B gets back the letter without A's consent. A has such a property therein as entitles him to recover it from B.

As we shall see when we come to speak of injunctions, the rights in respect to private letters are peculiar. Thus, in one case it was said that by sending the letter the writer has given, for the purpose of reading, and in some cases of keeping it, a property to the person to whom the letter was addressed, yet the gift is so restrained that *ultra* the purposes for which the letter was sent, the property is in the sender. (*Gee* v. *Pritchard*, 2 Swan, 402.) But still the receiver of letters has, on the other hand, such a property in the paper on which they are written, that though he has no right to publish them, yet he may bring an action of detinue against the writer, in case they have by any means got back into his possession. (*Oliver* v. *Oliver*, 8 Jur. N. S. 512.) Thus each party has a qualified propety which entitles him to the appropriate specific relief for its protection.

Rights as to letters.

(*d.*) A deposits books and papers for safe custody with B. B loses them and C finds them, but refuses to deliver them to B when demanded. B may recover them from C, subject to C's right, if any, under section 168 of the Indian Contract Act, 1872.

With regard to the finder of property, though he is not bound to take charge of the goods, yet if he does so, he has the same responsibility as an ordinary bailee. (Story on *Bail*, 85-87; I. C. Act, ss.

Finder of property, rights of.

71, 151.) He may not sue for salvage or compensation, but he may detain the goods till paid for his trouble, and as to goods commonly on sale, he may sell them if perishable, or if his charges amount to two-thirds of the value, and the owner declines to pay them. (I. C. Act, ss. 168, 169; Story on *Bail*, 621.) If a specific reward has been offered for the return of the goods lost, the finder may sue for the same and he has a particular lien therefor; but not if it was a mere general offer, as of "a liberal reward." (I. C. Act, s. 168; Story on *Bail*, 121*a*; 621*a*; see *Tarner* v. *Walker*, L. R. 2 Q. B. 301, on giving information entitling to a reward.) After an improper refusal to deliver, the property is at the absolute risk of the bailee, however it may perish or be damaged; and he is also liable to pay interest, or make other compensation for the detention of the property. (Story on *Bail*, 122, 123; I. C. Act, s. 161.) In such a case as finding of property, there must be a demand and refusal before any liability for the detention can arise. A refusal must be proved, and mere excuses will not be sufficient. Still, the refusal need not be express, for if a man refuses to deliver, except upon conditions which he has no right to impose, that is equivalent to an absolute refusal. Thus, if the finder improperly refuses to deliver them up until the owner pay or secure a debt which he owes him, this makes the detention wrongful. But the finder is entitled to a reasonable time necessary to make proper inquiry to satisfy himself that the claimant is the owner; but not if there is no reasonable ground for doubt to whom the goods should be delivered. (*Isack* v. *Clarke*, 1 Roll. R. 130; *Pillot* v. *Wilkinson*, 10 Jur. N. S. 991.)

(*e*.) A, a warehouse-keeper, is charged with the delivery of certain goods to Z, which B takes out of A's possession. A may sue B for the goods.

Right of possession, and special property distinguished.

This is an example of the temporary right of possession sufficient to support a suit under this section. And here I may notice that in many cases and books the ground of the right to sue is often spoken of as a "special property" in the thing sought to be recovered. Often this is more a dispute about terms than substance, but, no doubt, accurately speaking, it is the right of possession, and not any special property, that supports the suit; there may be special property giving a right to possession, as in the case of a pledge of jewels, or the receiver of a letter; but there may be a right of possession without any

special property, as in the case of a naked depositary, or of an officer who has taken goods in execution; and, further, there may be a special property in a thing, that is, a qualified or subordinate right or interest therein, which gives no right at all to possession, as in the case of the sender of a letter. Wherever, therefore, the right of possession is not coupled with absolute ownership, it is always the safer, and often the only accurate term to speak of a special or temporary right to the present possession, rather than of a special property which may or may not be present. (See Story on *Bail*, 93 *c* to 93 *i*; *Giles* v. *Grover*, 6 Bligh. R. 452.) There may be a right to immediate possession, though there has never yet been actual possession, as in the case of a factor to whom goods have been consigned, but by whom they have never been received (*Fowler* v. *Down*, 1 B. & P. 47), or in the case of a contract of sale, where payment has been made, or is to be made in future with a right to immediate delivery. (I. C. Act, s. 96.) On the other hand, the actual possession may have been voluntarily parted with, and yet there may be a right to possession, as in the case of a sale and delivery of goods obtained by fraud, where the seller may recover possession from the buyer or his transferee with notice. (Civil P. Code, Sch. 4, form 98.)

Measure of damages.

Lastly, as to the measure of damages recoverable. Section 208, Civil P. Code, requires the decree for the delivery of specific moveables, to state also, "the amount of money to be paid as an alternative if delivery cannot be had;" to which may be added a further sum by way of compensation or damages for any special loss by reason of their detention. But, unlike what used to be the rule in English law, the defendant has no option to pay the damages and retain the goods, for by s. 259, Civil P. Code, the actual delivery may be enforced by the attachment of his property and the imprisonment of his person.

Value of goods.

Two sums will thus have to be ascertained and fixed by the decree, (1) the amount as an alternative for delivery; and (2) the special damages, if any, for the detention. The first item should be the value of the goods, and if this is a fixed value it is simple enough; but it may be that the value has been changed by the tort, or that it is in itself a fluctuating value. It must be remembered that in these suits the manner in which defendant got possession is disregarded, and nothing can be given for it. But if the goods were got by a severance, the defendant cannot

be allowed to reduce this item of damages by deducting the cost of severance, or the increased value given to the goods by reason of the severance; for the wrong is the detention of the goods when severed, and the right of the plaintiff is to the delivery of the severed goods, and the alternative for non-delivery must be their value as such. (*Wild* v. *Holt*, 9 M. & W. 672; *Martin* v. *Porter*, 5 M. & W. 351; *semble*, this is not the general rule in America, see Sedg. on D. 624 (*n*).) On the other hand, an improved value given to the goods, as by a change in their form by the act of the defendant after they came into his possession, cannot be added to this item of damages; for the wrong was the detention of the goods as unchanged, and, though if redelivered, the plaintiff, of necessity, takes them as they are, yet, in case of non-delivery, the alternative amount is their value to the plaintiff as unchanged. (*Reid* v. *Fairbank*, 13 C. B. 692, 729.) So, where after the detention began, there has been a confusion of property, the item of value is the value of the plaintiff's goods separately, excluding the value of the goods mixed with them. (Mayne on D. (3rd ed.) 339, *et seq.*)

Where the value is fluctuating or uncertain.

But the value may be one that fluctuates, as in the case of stock or shares; and then, generally, where goods have not been returned, it seems the better opinion that the value of the goods is to be taken at their market price, if any, or otherwise their actual value to the owner, at the time when the detention began (and in case of a demand and refusal, this will be at the time of demand), or at the time of trial, whichever is highest: for the wrong being the detention, that is a continuous act reaching down to the time of trial. (*France* v. *Gaudet*, L. R. 6 Q. B. 204; *Greening* v. *Wilkinson*, 1 C. & P. 625; *Archer* v. *Williams*, 5 C. B. 318; 2 Selw. N. P. 1378; Mayne on D. (3rd ed.) 339, *et seq.*; Sedg. on D. 550, 571-3.) The market price may be that at the principal or only place of sale for such goods, less the cost of conveyance there. (*Burmah Corp.* v. *M. Mohamed*, L. R. 5 Ind. Ap. 134.) If the value is doubtful, and the defendant got or retains possession forcibly or fraudulently, and will not produce the article, the presumption is that it is of the highest value of an article of that kind: and where it is shown that the defendant has come dishonestly by part of the property, it may be presumed that he got possession of the whole. (*Armory* v. *Delamirie*, 1 Sm. L. C. 374; *Mortimer* v. *Cradock*, 12 L. J. 166 C. P.) Otherwise, where the first taking was

lawful, and the plaintiff has, or ought to have, the means of showing the value of the goods, as where the delivery was under a contract, or, in any case, where the value is a matter peculiarly within the knowledge of the plaintiff, as where he sues for the detention of letters, documents, or title-deeds, the plaintiff must prove the value, or the damages will be nominal only. (*Cook* v. *Kartle*, 8 C. & P. 568; *Davis* v. *L. & N. W. Ry. Co.*, 7 W. R. 105; *Crossfield* v. *Such*, 8 Exch. 159.)

Value of bills, &c.

Where the property is a bill or valuable security, the value is its nominal amount, or its value in the hands of the plaintiff, if he had not lost possession of it: to this, interest is always to be added as a special damage, since that is an advantage of which the plaintiff has been necessarily deprived by the wrongful act of the defendant. (*Delegal* v. *Naylor*, Bing. 460; Mayne on D. 339 *et seq.*) If the security was void at the time of the tort, and not by the act of the defendant, only nominal damages can be given as its value; otherwise, if rendered worthless by the act of the defendant, its value in the hands of the plaintiff must be given. (*Wills* v. *Wells*, 2 Taunt. 267; *McLeod* v. *M'Glue*, 2 Scott, N. R. 604.)

Value of title-deeds.

In suits for title-deeds the measure will be the full value of the estate to which they belong, subject to reduction to nominal damages on their being given up. (*Loosemore* v. *Radford*, 9 M. & W. 657; Sedg. on D. 565.)

Special damage for detention.

Any special damage, the natural and immediate consequence of the defendant's act, may be shown and allowed for; as, the loss in trade or credit from an unlawful detention of goods, or costs properly incurred by the plaintiff in consequence of their loss. If goods are ultimately returned, but have fallen in price, the difference in their price at the time of the tort or of the demand by the plaintiff, and at the time of the return, may be given as a special damage consequent upon the tort. (*Williams* v. *Archer*, 5 C. B. 318.) Where a ship or other chattel in course of profitable use, or an essential part of machinery in use is wrongfully detained, the loss of profits from non-user is to be allowed for. (*De Mattos* v. *Gibson*, 7 Jur. N. S. 282.)

Mitigation of damages.

In mitigation of damages may be shown the return of the goods, or what is equivalent to it, so that the plaintiff may be entitled only to nominal damages; or that the interest of the plaintiff is nominal

only, as where the transfer to the plaintiff was merely to defeat the creditors of the real owner. (*Hiort* v. *L. N. W. Ry. Co.*, 4 Ex. D. 188; *Cameron* v. *Wynch*, 2 C. & K. 264.) A bailee is entitled to recover against a stranger the full value, but against the owner only in proportion to his own special interest. (Story on Bail, 352.) So, if the defendant, though not the owner, has an interest in the goods, the measure is not the mere value of the goods, but the value of the plaintiff's interest in them at the time of the tort; otherwise, where the plaintiff is entitled to hold them as absolute owner, he is entitled to their full value. (*Brierly* v. *Kendall*, 17 Q. B. 937; *Toms* v. *Wilson*, 10 Jur. N. S. 201; see *Johnson* v. *Mears*, 10 Jur. N. S. 99; *Johnson* v. *L. Y. Ry. Co.*, 3 C. P. D. 499.) And, though where the plaintiff relies, not on the fact of possession, but only on his right to it, the defendant may rebut the plaintiff's title by showing a title in a third person. (*Gadsden* v. *Barrow*, 9 Exch. 514; Bullen and Leake's Prec. Pl. 428); yet against one in possession, a wrong-doer may not, even in mitigation of damages, set up the title of a third person, or show that some other than himself has a joint interest in the goods. (*Jeffries* v. *G. W. Ry. Co.*, 5 E. & B. 802; *Finch* v. *Blount*, 7 C. & P. 478.) The cost of keeping the chattel cannot be shown in reduction of damages. (*Wormer* v. *Biggs*, 2 C. & K. 31.)

Liability of person in possession, not as owner, to deliver to person entitled to immediate possession,

11. Any person having the possession or control of a particular article of moveable property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, in any of the following cases:—

(*a*) when the thing claimed is held by the defendant as the agent or trustee of the claimant;

(*b*) when compensation in money would not afford the claimant adequate relief for the loss of the thing claimed;

(*c*) when it would be extremely difficult to ascertain the actual damage caused by its loss;

(*d*) when the possession of the thing claimed has been wrongfully transferred from the claimant.

Illustrations.

of clause (*a*) :—A proceeding to Europe, leaves his furniture in charge of B as his agent during his absence. B, without A's authority, pledges the furniture to C, and C, knowing that B had no right to pledge the furniture, advertises it for sale. C may be compelled to deliver the furniture to A, for he holds it as A's trustee.

of clause (*b*) :—Z has got possession of an idol belonging to A's family, and of which A is the proper custodian. Z may be compelled to deliver the idol to A.

of clause (*c*) :—A is entitled to a picture by a dead painter and a pair of rare China vases. B has possession of them. The articles are of too special a character to bear an ascertainable market-value. B may be compelled to deliver them to A.

S. 11 distinguished from s. 10.

The distinction between this section and s. 10 is, that under the latter the relief given is in the ordinary course prescribed by the Civil Procedure Code, the decree being framed under s. 208 and executed under s. 259 ; but in the four classes of cases mentioned in this section the decree would be special, and limited to the specific delivery of the article, and would, I apprehend, be executed in the manner prescribed for a decree for the performance of a particular act in s. 260. The difference between the sections is thus distinct though not very great, as the decree under s. 208 does not give a bare option to pay the damages or deliver the goods at will, and under both s. 10 and s. 11, the right to the possession is the foundation of the suit. The form of plaint No. 103 in Sched. 4 to the Civil Procedure Code, is an example of a plaint under this section, and, as there shown, it will be found that relief under this section will often have to be coupled with the preventive relief of an injunction. If a decree has been satisfied under s. 259, by the payment to the plaintiff of the damages in full, fixed under s. 208, the property in the moveables, the subject-matter of the suit would thereupon become vested in the defendant ; but this will not necessarily be so in a suit under this section, for the compensation or damages recovered under s. 260, Civil Procedure Code, on default of the defendant in obeying the decree, may or may not include the value of the particular article of property,

and in two of the classes of cases at least this is assumed to be impracticable. Another distinction between the sections is that a suit under s. 11 cannot be brought against the owner of the particular article. It may be, as we have seen, that a person has a special or temporary right to the present possession of moveables as against the owner himself; but, if so, he can in no case sue the owner under s. 11, but must be content with the ordinary procedure.

Instances of relief.

In the first three classes of cases described in the clauses of this section the relief of specific delivery has long been administered by English courts of equity; and the fourth class of cases is very analogous to that in which a summary and specific relief is given by s. 9 in respect to immoveable property. Generally, as to moveable articles, the intrinsic value is a matter easily ascertained; and that sum would ordinarily be a full compensation for them: but articles of curiosity or antiquity, and still more, articles of family interest, such as heir-looms, or connected with events in family history, cannot be represented by a sum of money to be given as damages, and courts of equity in England soon began to compel their actual delivery. The actual value of an heir-

Under clause (*b*.)

loom might perhaps be easily calculated, but that would not be its real value to the family to whom it belongs, as in the leading case of *Pusey* v. *Pusey* (1 L. C. in Eq. 890), where the suit was by the heir to recover a horn with an inscription, which for centuries had been the token by which the family estate was held. This is just the kind of case put in clause (*b*).

Under clause (*c*.)

Or it may be an article of such antiquity and curious workmanship that no two men would value it at the same price, as in the other leading case of *Duke of Somerset* v. *Cookson*, where the article was a curious old silver shrine remarkable for a Grecian inscription and dedication to the god Hercules. This is just the case put in clause (*c*). To these cases English courts of equity soon added the rule that if there subsist any fiduciary relation between the parties, then delivery of specific articles will be enforced, though not of peculiar or intrinsic value. The

Under clause (*a*)

Illustration to clause (*a*) is almost precisely the same as the English case of *Wood* v. *Rowcliffe* (3 Hare 304). It should be observed that C is in the Illustration assumed to have notice of B's true relation and authority; otherwise the rule applies that is laid down in s. 178, Indian Contract

Act, that any person entrusted with the possession of goods, or the documents of title thereto, may make a valid pledge of either, to one acting in good faith, if the circumstances do not raise a reasonable presumption that the pledgor is acting improperly, or if the possession of the goods or documents has not been obtained by an offence or fraud. In such a case the test of good faith would be, were the circumstances such that a reasonable man and a man of business, applying his understanding to them, would certainly infer that the agent had not authority to make the pledge, or that he was acting *mala fide*, in respect thereof, to his principal. (*Gobind, C. S.* v. *Ad. Gen., Bengal*, 8 Jur. N. S. 343.)

Under clause (*d*)

In a case under clause (*d*) the point to be regarded is the way in which the claimant lost possession of the article. The possession must have been transferred "wrongfully," that is, as I understand it, wholly tortiously, as by an offence or fraud so that no property therein could pass, and it is immaterial that the defendant in possession is an innocent purchaser for value without notice of any defect of title. If the transfer was under some contract which was merely voidable at the option of the claimant, then though the defendant in possession took with notice, and so took nothing, yet the claimant's remedy against him would not be under this section but under the ordinary procedure. (See Indian Contract Act, s. 108, and its Illustrations; and form of plaint, No. 98 in Sched. 4, Civil Procedure Code.)

CHAPTER II.

OF THE SPECIFIC PERFORMANCE OF CONTRACTS.

(*a*) *Contracts which may be specifically enforced.*

Relief limited to contracts.

The relief given by this chapter is limited to contracts. Now "contract" is a word defined by the Indian Contract Act, 1872, and, therefore, by the interpretation clause, there must be given to it here the meaning which the Indian Contract Act assigns to it. A contract is therein defined to be "an agreement enforceable by law." Further, in s. 4, clause (*a*), it is declared that unless otherwise expressly provided, no right to relief is given "in respect of any

agreement which is not a contract." It follows, therefore, that the agreement must have been intended by the parties as their contract, and that a contract, the specific performance of which is sought, must in all its essentials, and also in all its forms, be one which conforms to the requirements of the law. Hence an agreement or proposal, expressly made subject to a formal contract being prepared or approved, is not such a contract, for parties may, and often do, negotiate the terms of their agreement subject to the reservation that until these heads, as to which they suppose themselves to be agreed, are embodied in a formal instrument, there shall be no binding agreement. But where an open cover, or proposal to insure before the goods to be insured were shipped, was given, and after shipment the insurers refused to grant policies to the amount mentioned in the cover, it was held that the application for the policies constituted an acceptance of a subsisting proposal and there was a binding contract with the charterer to issue a policy in terms of the open cover. (*Bhugwandass* v. *Netherlands Insurance Co.*, 14 Ap. Cas. 83.)

Contract must be perfect.

Where all the terms are complete and agreed upon, though it is also agreed that they shall be embodied in a formal instrument, then there is a complete contract, and either party may compel the other, as part of it, to execute the instrument agreed upon. (*Rossiter* v. *Miller*, 3 Ap. Cas. 1152; *Winn* v. *Bull*, 7 Ch. D. 29; *Bonnewell* v. *Jenkins*, 8 Ch. D. 70, and *May* v. *Thomson*, 20 Ch. D. 705.)

A purchaser had deposited part of the purchase-money and it was agreed that he should pay the balance within a stipulated time, and that the vendor should convey. The purchaser delayed in paying and insisted that a warranty of title should be inserted in the conveyance. The court found that he had not shewn any right to such a covenant and it was held that his delay in paying the purchase-money was not excused. Specific performance was therefore refused. (*Babu Bindeshri Parshad* v. *Mahant Jairam Gir*, 14 I. A. 173.)

Williams v. *Brisco*, 22 Ch. D. 441 (C. A.) was an instance where looking at the whole correspondence (*Hussey* v. *Horne-Payne*, 4 Ap. Cas. 311), it was held that there was no definite agreement but only a negotiation. Where there is a condition precedent to be performed by the plaintiff, and the defendant has absolutely refused to perform his part of the contract, he has thereby waived the right to insist on the plaintiff performing the condition precedent and plaintiff need not

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do it; but then his form of relief is by damages for breach of contract, and not by suit for specific performance.

Hence, also, if a particular kind of contract is required by law to be in writing, to be executed with certain formalities, to be registered or so on, no suit for specific performance can be brought to enforce one which is deficient in these respects.[1] Further, clause (*c*) of s. 4 declares that unless otherwise expressly provided, nothing is to affect the operation of the Indian Registration Act on documents. If this be a correct view, then there are numerous cases in English books under the head of specific performance, which can have no application to suits under this chapter. English legislation has sought, by the Statute of Frauds, and other enactments, to make certain formalities, as writing and so on, essential to the validity of some kinds of contract. But English courts of equity have thought themselves entitled to disregard these formalities in seeking to do what they have regarded as substantial justice. Plaintiffs have been allowed to enforce, specifically, contracts altogether deficient in the requisite formalities, and chiefly so, perhaps, on the ground of some alleged part performance of an informal agreement. But eminent judges and learned writers have doubted whether the result has not been only to open to fraud and perjury the very door which the law had sought to close (see 1 Story's Eq. 765-6).

Different rule in English equity.

Many of the English cases classed among those on part performance of informal contracts are really cases in which there really was no genuine or complete contract at all. Thus when a man induced a woman to serve him as his housekeeper without wages for many years by a verbal promise to make a will leaving her a life estate in certain land, and he afterwards signed such a will which failed from not being duly attested, specific performance of the contract was refused against the heir. The real ground of decision was that the case was one of conduct on her part induced by such promise, rather than one of definite contract for mutual consideration made between her and him at any particular time. Thus there was no contract on her part which she would have broken by voluntarily leaving his service; no agreement by her to serve without wages or to release her

[1] An executory contract need not be registered; L. R. 1 Ind. Ap. 124; Act III of 1877, s. 17 (*h*).

claims to such. On his part any contract was conditional on a series of acts extending over all his own life, and optional on her part; and if he had dismissed her in his lifetime there could have been no relief in law or equity against him for such dismissal (*Maddison* v. *Alderson*, 8 Ap. Cas. 472.) In another case one brother agreed to purchase an estate from another brother, and then sought to repudiate the contract, but influenced by a suggestion that the brother intended to devise other property to him, completed the purchase. Such a will was made but revoked and the plaintiff sued for damages for breach of such contract; but it was held that there had not been any definite and concluded agreement between the brothers, and that the completion of the purchase could not be shown to be referable only to the alleged agreement to devise the other land, and so a part performance of it by the plaintiff. (*Humphreys* v. *Green*, 10 Q B. D. 158.)

In *Britain* v. *Rossiter* (11 Q. B. D. 123) it was said that the doctrine of part performance will not be extended beyond contracts relating to land under s. 4 of the Statute of Frauds, and thus will not apply to a contract of service for more than a year. But as to what was said at p. 133, the remark occurs that as to contracts relating to land, specific performance may generally be enforced, and is often the only possible remedy; but as to contracts of service, there can never be specific performance. *Cahill* v. *Cahill* (8 Ap. Cas. 420) was a striking instance of specific performance of an agreement being refused where there had been a non-compliance with a formality required by statute. On a dispute between husband and wife and a suit by the former for restitution of conjugal rights, an agreement by way of compromise was executed which would otherwise have been regarded as a complete agreement, but the wife had never acknowledged it under the statute so as to make it legally conclusive against her; and on this ground it was held on the death of the husband that she could not be compelled specifically to perform it. No question of part performance seems to have arisen in the case as the suit was merely in abeyance but not formally stayed, and nothing else was done. A deed in accordance with the agreement had been drawn up, but the wife always declined to execute it, when it would no doubt have been acknowledged by her in due form, and this she could not afterwards be compelled specifically to perform. The claim to specific performance of the agreement was made by way of defence and counter claim in a suit by the wife to

enforce her rights under an ante-nuptial settlement which had been varied by the agreement. Enactments rendering agreements invalid apart from certain formalities, as writing or registration, are really based upon a balance of convenience; it may be regretted that a negligent person should occasionally be defrauded for the want of a mere form, but it would be worse to leave a wide door always open to perjury and fraud, and uncertainty in contracts. I think it was the very purpose of the interpretation clause, and of the savings in s. 4 to shut out this class of English cases, and to require the courts in India, in administering the equity of specific performance, not to disregard the requirements of any law in respect to the forms of contracts. If there has been only an oral agreement in place of the requisite written contract, and one party, on the faith of it, suffers loss, as by laying out money upon land, it is one thing to give him a remedy by compensation or damages, for his loss, and quite another thing, on the ground of what is no evidence of any particular agreement, to seek to ascertain all its terms and then enforce them. (*Foster* v. *Hale*, 3 Ves. 713.) Where there has been a written contract, and it is not what it should have been, ample relief is secured in this chapter against the success of fraud or mistake; and trusts in all their variety may also be enforced under this chapter.

English courts act *in personam*.

Another class of English cases also inapplicable in our courts, is where an English court of equity, by means of its peculiar method of working out its decrees against the person of the defendant, has been enabled to draw to itself the enforcing of contracts relating to lands outside its territorial jurisdiction. This, clearly, no civil court in India may assume to do.[1]

Cases in which specific performance enforceable.

12. Except as otherwise provided in this chapter, the specific performance of any contract may in the discretion of the court be enforced—

(*a*) when the act agreed to be done is in the performance, wholly or partly, of a trust; *

[1] See *Hart* v. *Herwig*, L. R. 8 Ch. 864; a thing within the jurisdiction though the subject of a foreign contract, may be dealt with.

Illustration.

[2] of clause (*a*):—A holds certain stock in trust for B. A wrongfully disposes of the stock. The law creates an obligation on A to restore the same quantity of stock to B, and B may enforce specific performance of this obligation.

Section 12 presupposes and assumes the existence of a contract or deed, the terms of which are before the court. (Per Stuart, C. J., *Maya Ram Prag Dat*, I. L. R. 5 All, at p. 51). And the contract must be a complete one (*Koylas Chunder Doss* v. *Tariney Churn Singhee*, I. L. R., 10 Cal. 588). In this case, where there had been no absolute proposal or undertaking to purchase, but, in the course of the negotiations, the price had been fixed, leaving the inspection of title deeds and the payment of earnest-money to be settled at a pre-arranged meeting, the court found that the payment of earnest-money had been treated as an element in the contract. It therefore held that the contract could not be completed until the amount of the earnest-money had been ascertained.

Enforcing trusts.

In treating of trustees and trusts as defined in s. 3, it has been seen that when once a trust has been constituted, the beneficiary may enforce the specific performance of that trust under this clause. When the trust is either express or implied this will be obvious, and even in the case of a constructive trust, it must be the same, as the fact that the relation of trustee and beneficiary has been created solely by force of law cannot alter or diminish the rights and duties flowing from that relation. As ancillary to the principal duty of a court of equity to see that the trusts are properly executed, the court has jurisdiction, when the welfare of the beneficiaries requires it, to remove the original trustees and to substitute others for them; and it is not essential that charges of misconduct should be established against them; and though those made may be greatly exaggerated, yet if upon the whole it is desirable for the beneficiaries, the court will exercise jurisdiction—(*Letterstedt* v. *Broers*, 9 Ap. Cas. 386). The court will always correct any error where a wrong-order has been made by it in cases of trust, and such error was due to misrepresentation or mistake of fact. (*Staniar* v. *Evans*, 34 Ch. D. 470).

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[2] This Illustration is repealed by Act II of 1882, and is therefore only applicable where the Trusts Act is not in force.

The Illustration to this clause, it should be observed, is quite general, leaving the origin of the trust immaterial. Cases to this effect will be found in the English books. Thus, though there will ordinarily be no decree for specific performance of contracts to purchase chattels, yet, if a trust be created, the circumstance that the subject-matter to which the trust is attached is a personal chattel, will not prevent the court from enforcing the due execution of that trust, not only against the trustees themselves, but against all persons who obtain possession of the property affected by the trust, provided they had notice of the trust. (*Pooley* v. *Budd*, 14 Beav. 34, 43, 44.) So where a person had declared himself to be the trustee of stock for another person, with whose money it had been purchased, it was held that the ordinary rule as to chattels did not apply, and a transfer was compelled to the person beneficially entitled. (*Stanton* v. *Percival*, 5 H. L. C. 257, 268.) Again, in such a case as where an executor, or heir, persuades his testator, or ancestor, not to do something which he otherwise would have done but for the promise of the executor, or heir, on behalf of some third person, as an intended legatee or younger children of the testator, or ancestor, this promise makes the executor, or heir, a trustee for such third person, and specific performance of the undertaking may be enforced under this clause (1 Story's Eq. 781.) The Illustration is probably taken from the case of *Forrest* v. *Elwes* (4 Ves. 497) where the beneficiary had the option either to have the stock replaced or the money produced by it with interest; for it is a general rule where a trustee sells in violation of his trust, that the parties beneficially entitled have an option to make him replace the stock or other property; or if it is for their benefit, to affirm his conduct and take what he has sold it for with interest, or what he has invested it in; and if he has made more, they may charge him with that also.[1] But they cannot insist upon repugnant claims, such as, for instance, in the case of a sale of stock, to have the stock replaced and to have interest (instead of dividends) or to take the money and have the dividends, as if it had remained stock. (2 Story's Eq. 1263.)

Option open to beneficiary.

[1] This is also the effect of Illustration (*g*) to s. 23 of Act II of 1882 by which, as already noticed, the Illustration to this clause (*a*) has been repealed so far as Act II of 1882 extends.

(*b*) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done ;

Illustration.

of clause (*b*) :—A agrees to buy, and B agrees to sell, a picture by a dead painter, and two rare China vases. A may compel B specifically to perform this contract, for there is no standard for ascertaining the actual damage which would be caused by its non-performance.

The distinction between this and clause (*c*) is the same as between clause (*c*) and clause (*b*) to s. 11. Another striking illustration of this clause is the case of *Lingen* v. *Simpson* (1 S. & St. 600), where, on the dissolution of a partnership, an agreement was made that a particular book, used in the trade, should be considered the exclusive property of one of the partners, and that a copy of it should be given to the other ; a specific performance of the agreement as to the copy was decreed as it is clear that no standard could exist as a measure of damages. In *Gray* v. *Smith* (43 Ch. D. 208) an agreement to retire from business was specifically enforced.

(*c*) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief ; or

Illustrations.

of clause (*c*) :—A contracts with B to sell him a house for Rs. 1,000, B is entitled to a decree directing A to convey the house to him, he paying the purchase-money.

In consideration of being released from certain obligations imposed on it by its Act of Incorporation, a railway company contract with Z to make an archway through their railway to connect lands of Z severed by the railway, to construct a road between certain specified points, to pay a certain annual sum towards the maintenance of this road, and also to construct a siding and a wharf as specified in the contract. Z is entitled to have this contract specifically enforced, for his interest in its performance cannot be adequately compensated for by money ; and the court may appoint a proper person to superintend the construction of the archway, road, siding, and wharf.

A contracts to sell, and B contracts to buy, a certain number of railway shares of a particular description. A refuses to complete the sale. B

may compel A specifically to perform this agreement, for the shares are limited in number and not always to be had in the market, and their possession carries with it the status of a shareholder, which cannot otherwise be procured.

A contracts with B to paint a picture for B, who agrees to pay therefor Rs. 1,000. The picture is painted. B is entitled to have it delivered to him on payment or tender of the Rs. 1,000.

This and the preceding clause (*b*) contain what was really the origin of the jurisdiction of English courts of equity to enforce specific performance of contracts; and the first Illustration to this clause is the ordinary instance of a sale of immoveable property, in respect to which the inadequacy of relief by way of damages is the most obvious. The second Illustration was probably suggested by the case of *Storer* v. *G. W. R Co.* (2 Y. & C. N. R. 48, 53), where a railway company undertook to build and maintain an archway on the pleasure-grounds of the plaintiff, through which the railway was to pass, upon his withdrawing all opposition, and to make it sufficient to permit a loaded carriage to pass under, and specific performance of the undertaking was decreed. This again is an example of a contract relating to land. The third Illustration is an example of the specific performance of contracts relating to personal property, on which subject the leading case is *Cuddee* v. *Rutter* (1 L. C. in Eq. 848.) In these cases, as we shall see, specific performance is the exception and not the rule. The Illustration itself is the case of *Duncuft* v. *Albrecht* (12 Sim. 189), in which Shadwell, V.C., said: "In my opinion there is not any sort of analogy between a quantity of three per cents., or any other stock of that description (which is always to be had by any person who chooses to apply for it in the market), and a certain number of railway shares of a particular description, which railway shares are limited in number, and which, as has been observed, are not always to be had in the market." (See also *Cheale* v. *Kenward*, 3 De G. & J. 27; *Shaw* v. *Fisher*, 2 De G. & Sm. 11.) And where specific performance has been decreed of a contract to purchase railway shares, the court will order the purchaser to pay the calls that have been made since the sale, to indemnify the vendor against all future calls in respect of the shares, and to take proper measures to procure himself to be registered. (*Wynne* v. *Price*, 3 De G. & Sm. 310.) Similarly, a contract to pay the plaintiff a certain annual sum for his life, and also a certain other sum by way of royalty on a certain measure of

a particular article to be manufactured by the defendant, during the life of the plaintiff, will be specifically performed, as damages could be calculated only by conjecture; and to compel a plaintiff, in such a case, to take damages, would be to compel him to sell the annual provision during his life, for which he had contracted, at a conjectural price. (*Ball* v. *Coggs*, 1 Bro. P. C. 140.) So also, a contract with the creditors of an insolvent to take over at a certain rate the debts due to them will be enforced, the dividends that may be eventually payable out of the estate being uncertain and conjectural. (*Adderley* v. *Dixon*, 1 S. & S. 607.)

In the fourth Illustration, it should be noted, that the picture is already painted; otherwise the relief could not be given, as the act depends upon the volition of the party (see s. 21, clause (*b*), and its Illustrations), and the court cannot decree that a person shall paint a picture any more than it can decree that a person shall act or sing at a theatre so many nights in the week.

(*d*) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.

of clause (*d*):—A transfers without endorsement, but for valuable consideration, a promissory note to B. A becomes insolvent, and C is appointed his assignee. B may compel C to endorse the note, for C has succeeded to A's liabilities, and a decree for pecuniary compensation for not endorsing the note would be fruitless.

In the Illustration, it is evident that C, as the assignee of A, really stands in the place of A, and is the proper person to do such an act as endorse the note. This section might be further illustrated by contracts for personal acts and proceedings. Thus a contract or covenant to renew a lease,—to invest money in lands and settle them in a particular manner, — to settle the boundaries between two estates,—to grant an annuity or charge it on land,—to indorse a bill or note, upon a transfer, when it has been omitted by design, or accident, or mistake,—are cases in which specific performance may be decreed. Similarly (it would seem), a surety may compel the debtor for whom he is liable, to pay the debt when due; or a covenant to save harmless may be enforced. So where property is agreed to be secured for certain purposes, and in certain events, and there is

danger of its being alienated or squandered, the contract may be specifically enforced by securing the property for the agreed purposes. (1 Story's Eq. 729-30.)

EXPLANATION.—Unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer moveable property can be thus relieved.

This does not proceed upon any distinction between real and personal property, but the true ground for the relief of specific performance is the need of it to afford an adequate or complete remedy. Ordinarily, each plot of land has, to the purchaser, some peculiar and special value,—by reason of its position, or quality, or the use he intends to make of it,—for which damages would not be a true satisfaction; while it is otherwise on a sale of stock or goods, as with the damages he may ordinarily purchase the same quantity of the like stock or goods. Strict equity might well insist on decreeing specific performance of every contract, for it is against conscience that a party should have a right of election, whether he will perform his contract, or only pay damages for the breach of it. This restriction of the relief stands, therefore, not so much upon any general principle, *ex æquo et bono*, as upon the general convenience of leaving the party to his remedy in damages, where that will give him a clear and full compensation. (1 Story's Eq. 717, 717*a*, and 746.)

Contracts of which the subject has partially ceased to exist.

13. Notwithstanding anything contained in section 56 of the Indian Contract Act, a contract is not wholly impossible of performance because a portion of its subject-matter, existing at its date, has ceased to exist at the time of the performance.

Illustrations.

(*a*) A contracts to sell a house to B for a lakh of rupees. The day after the contract is made, the house is destroyed by a cyclone. B may be

compelled to perform his part of the contract by paying the purchase-money.

(*b*) In consideration of a sum of money payable by B, A contracts to grant an annuity to B for B's life. The day after the contract has been made, B is thrown from his horse and killed. B's representative may be compelled to pay the purchase-money.

In this chapter the general law of contracts is referred to only so far as it bears upon the relief of specific performance, and the ordinary grounds of suit or defence upon a contract are not otherwise stated. Hence such a general defence as that there was an implied condition that the things, the subject-matter of the contract, should be in existence when the time for performance came, is taken for granted. (*Howell* v. *Coupland*, 1 Q. B. D. 258.) So also with such a defence as that there has been a subsequent rescission of the contract, either by mutual agreement or under a stipulation reserving such a right to one of the parties. (See Fry on Spec. Perf. (2nd ed.) 444, *et seq.*) So here, the object of s. 13 is to explain the bearing of such a general rule as that in s. 56, Indian Contract Act, upon a suit for specific performance. The purport of s. 56 is that a contract to do an act which, after the contract is made, becomes impossible, or becomes, by no fault of the promissor, unlawful, is void; but if the promissor knew, or might reasonably have known it, and the promisee did not, then compensation is still payable by the former to the latter for non-performance.

Purport of s. 56, Ind. Cont. Act.

Illustration (*a*) to s. 13 is the same as the case of *Paine* v. *Mellor* (6 Ves. 349), and embodies the general rule that a vendee being the equitable owner of the estate from the time of the contract for sale must pay the consideration for it, although the estate itself be destroyed between the agreement and the conveyance; and, on the other hand, he will be entitled to any benefit which may accrue to the estate in the interim; assuming, of course, that the contract is complete, as that the title is good, or that the purchaser has previously to the accident waived any objections to it. (Sugden's V. & P. 341-2.)

The Illustrations examined.

Hence, when a contract of sale of a house was complete, but before possession was given, the house was destroyed by fire, and the vendor recovered the amount of loss from the insurers, but the purchaser paid the full amount of purchase-money under the contract to the vendor, it was held, that as the insurance was a contract of indemnity,

the insurers might recover the money back from the vendor (*Castellain* v. *Preston*, 11 Q. B. D. 380.) Similarly, a contract for shares in a company which is afterwards wound up may be enforced; whereas one made after and in ignorance of the winding-up would not be. (*Coles* v. *Bristowe*, L. R. 6 Eq. 149; *Emmerson's case*, L. R 1 Ch. 433.) Illustration (*b*) rests on the same general principle of equity, by which that which is agreed to be done is considered as actually performed; so that if a person agree to give a contingent consideration for an estate, as an annuity for the life of the vendor, and the vendor die before the conveyance is executed, by which event the annuity ceases, yet the purchaser will be entitled to a specific performance of his contract. (*Mortimor* v. *Capper*, 1 Bro. C. C. 156.) It is the same where the life annuity is not the price but the subject of the sale. If the annuitant happen to die before the annuity is legally transferred to the purchaser, it is no objection to specific performance, for the purchaser agreed to buy an interest of uncertain duration, and he cannot complain that the contingency is unfavourable to him. (Sugden's V. & P. 245.) Any apparent conflict between such cases and s. 56, Indian Contract Act, is thus obviated; and if the history of the passing of this Act has been accurately reported, this would seem to have been the main purpose of the section. But I do not think it is necessary to limit its purpose to this; for it would seem to be consistent with the scope of the terms used to recognise the distinction which has been laid down, that if a man has performed so much of the agreement as that he is not *in statu quo*, and is in no default for not performing the residue, he shall have a specific performance of the agreement from the other party; whereas, if he has done nothing to alter his position, and the falling through of the agreement simply leaves him *in statu quo* ante, then there is no equity to enforce specific performance. Thus, if a man has contracted on marriage to receive a portion with his wife, and in return to settle certain lands free of incumbrances on his wife and her issue, and he has sold other lands and cleared the incumbrances, and then his wife dies without issue, before the settlement is actually made, he is entitled to payment of the portion. (1 Story's Eq. 772—4.)

Scope of the section.

I take it that s. 13 is a preliminary and general section, which will have to be borne in mind in acting under s. 14 or s. 15, or in the exercise of the judicial discretion required by s. 22.

Limit of the section.

Lastly, it may be noticed that s. 56, Indian Contract Act, includes also the case of an act becoming, after the contract is made, unlawful; but s. 14 is limited to where it has become impossible, because part of the subject-matter has ceased to exist. This seems a necessary and proper restriction, because the general rule of English equity that one seeking specific performance cannot call upon the other party to do an act which he is no longer lawfully competent to do, or to do an immoral act, or one against public policy, or involving a breach of trust [1 Story's Eq. 716 (*n*), 769], is included by the general proviso in s. 4, cl. (*a*), that to give a right to relief the agreement must be a contract enforceable by law.

Specific performance of part of contract where part unperformed is small.

14. Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency

Illustrations.

(*a*) A contracts to sell B a piece of land consisting of 100 bighas. It turns out that 98 bighas of the land belong to A, and the two remaining bighas to a stranger, who refuses to part with them. The two bighas are not necessary for the use or enjoyment of the 98 bighas, nor so important for such use or enjoyment that the loss of them may not be made good in money. A may be directed at the suit of B to convey to B the 98 bighas and to make compensation to him for not conveying the two remaining bighas; or B may be directed, at the suit of A, to pay to A on receiving the conveyance and possession of the land, the stipulated purchase-money, less a sum awarded as compensation for the deficiency.

(*b*) In a contract for the sale and purchase of a house and lands for two lakhs of rupees, it is agreed that part of the furniture should be taken at a valuation. The court may direct specific performance of the contract notwithstanding the parties are unable to agree as to the valuation of the furniture, and may either have the furniture valued in the suit and include it in the decree for specific performance, or may confine its decree to the house.

15. Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation, either for the deficiency, or for the loss or damage sustained by him through the default of the defendant.

Specific performance of part of contract where part unperformed is large.

Illustrations.

(*a*) A contracts to sell to B a piece of land consisting of 100 bighas. It turns out that 50 bighas of the land belong to A, and the other 50 bighas to a stranger, who refuses to part with them A cannot obtain a decree against B for the specific performance of the contract; but if B is willing to pay the price agreed upon, and to take the 50 bighas which belong to A, waiving all right to compensation either for the deficiency or for loss sustained by him through A's neglect or default, B is entitled to a decree directing A to convey those 50 bighas to him on payment of the purchase-money.

(*b*) A contracts to sell to B an estate with a house and garden for a lakh of rupees. The garden is important for the enjoyment of the house. It turns out that A is unable to convey the garden. A cannot obtain a decree against B for the specific performance of the contract; but if B is willing to pay the price agreed upon, and to take the estate and house without the garden, waiving all right to compensation either for the deficiency or for loss sustained by him through A's neglect or default, B is entitled to a decree directing A to convey the house to him on payment of the purchase-money.

These two sections and s. 16 comprise the only cases in which specific performance of a contract, not in its entirety, but in part only, may be decreed. But cases within these sections must be distinguished from cases within s. 26. In both classes of cases, specific

Section 26 distinguished.

performance, when carried out, leads to a result different from that provided in the contract; but in the former the variation is not in the agreement itself, but in its application to the subject-matter, while in the latter, the variation is not in its application, but in the terms of the agreement itself. Or briefly, in other words, in the first there is an objective variation,—in the second, a subjective variation.

It will help to clearness to consider s. 16 afterwards by itself. In cases under s. 14, and the first part of s. 15, the difficulty often is to decide whether the part incapable of performance is "small" or "considerable," or, to speak more accurately, material or otherwise. In the wording of the two sections there is this difference to be noted: in s. 14 to justify, a decree of specific performance, the part omitted must be both small *and* admit of compensation; in s. 15 it is enough to ground a refusal, that the part to be omitted is either considerable, *or* does not admit of compensation.

Sections 14 and 15 distinguished.

The English leading case on the subject of specific performance with compensation is *Seton* v. *Slade* (2 L. C. in Eq. 501), and it will be convenient to take first the cases where the seller is suing the buyer; and secondly, where the buyer is suing the seller. The proviso to s. 15 will then follow for remark; and lastly, I shall refer to the cases where the failure is as to the *time* agreed upon in the contract;—a large class of cases not expressly referred to in this chapter, but necessarily, I think, included in it, and properly falling to be considered under these sections.

Division of cases.

I. Where the seller is suing the buyer.

The Illustration (*a*) to s. 14 assumes that the two bighas are not necessary; but of course they might very well be so; thus, if a man bought the land for the purpose of carrying on his business as a wharfinger, and the two bighas formed the frontage to the stream, they would be essential, and then specific performance would not be decreed against him. (*Peers* v. *Lambart*, 7 Beav. 546.) So, where upon a sale of a house and about four acres of land, the seller could not make a title to a small strip of land between the house and the road, so that people in passing could look in at the windows, it was held not to be a case for compensation. (*Perkins* v. *Ede*, 16 Beav. 193; *Arnold* v. *Arnold*, 14 Ch. D. 270.) Again, when a purchaser, as part consideration agreed to give a right of way to the vendor, and having delayed in doing so the

Seller against buyer.

vendor suffered loss, it was held that the latter was not entitled to damages. (*Rowe* v. *School Board L.*, 36 Ch. D. 619.)

Defect in title.

Again, the defect may be, not in the quantity of the land, but in the quality of the title to it; and it is often a nice question whether the variance is such that the buyer ought to be decreed to take the inferior title with compensation for the variance. Thus if a buyer agreed for an assignment of an original lease for ninety-nine years, he cannot be made to take an under-lease for that term less three days; for the assignment and the under-lease are essentially different; in the latter, for instance, there is no privity of contract, in fact or in law, between the head landlord and the under-tenant. (*Madeley* v. *Booth*, 2 DeG. & S. 718; see *Camberwell, &c. So.* v. *Holloway*, 13 Ch. D. 760, and *Ebsworth* v. *Tidy's Contract*, 42 Ch. D. 23, where there was an objection to the title on account of restrictive covenants.) So, the buyer of the entirety will not be compelled to take an undivided share of an estate; nor one of an estate in possession, a remainder expectant upon a life interest. (*Att.-Gen.* v. *Day*, 1 Ves. 218; *Collier* v. *Jenkins*, You. 295.) So there may be some undisclosed rights over an estate, as a right to dig for mines, or rights of easement prejudicial to the known purpose of the buyer, which may be material (*Seaman* v. *Vaudrey*, 16 Ves. 390; *Shackleton* v. *Sutcliffe*, DeG. & S. 609), while other defects, such as undisclosed quit-rents, may very well be the subject of compensation. (*Esdale* v. *Stephenson*, 1 S. & S. 122; *Jones* v. *Rimmer*, 14 Ch. D. 588, where the omission was fatal.) If two distinct estates are sold for one entire sum, and the title to one fails, the court cannot decompose the sum, and adjust for the buyer the relative values of the two, so as to compel him to take the other; but if an estate is sold by auction in lots, and the title to some lots fails, the lots with a good title must be accepted, if they are not complicated with the others, but not if complicated, as where in a purchase of a mansion-house in one lot, and farms, &c., in others, and no title can be made to the lot with the mansion-house. (*Poole* v. *Shergold*, 2 Bro. C. C. 118; Sugden's V. & P. 265.) The tendency is not to extend the cases of enforcing purchase with compensation; and when the defect to be compensated is the existence of restrictive covenants on the use of the land, it is almost impossible to assess compensation (*Cato* v. *Thompson*, 9 Q. B. D. 616.) Here the purchaser knew of those covenants, but there was an express covenant to make a "marketable title," and this meant, it was held,

released of the covenants which made it not marketable. *In re Higgins* and *Hitchman's Contract* (21 Ch. D. 95) also shows that such restrictive covenants make a title not marketable. In *Brewer* v. *Broadwood* (22 Ch. D. 105), where there was a contract to sell an agreement for a lease, and it turned out that the agreement had become voidable at the will of a third person, who was willing to confirm it on certain conditions; it was held that the buyer was entitled to repudiate the contract and that the seller could not recover damages against him. (*Cf.* the cases herein cited of *Noble* v. *Edwards*, 5 Ch. D. 378, and *Weston* v. *Savage*, 10 Ch. D. 736.) In *Nottingham Patent etc. Co.* v. *Butler* (16 Q. B. D. 778) the liability to restrictive covenants of which there is no notice was held to be effective as a defence to specific performance. For cases when in agreements to purchase leases, there is no notice of specially onerous covenants, see *Reeve* v. *Berridge* (20 Q. B. D. 523), and *Hyde* v. *Warden* (3 Ex. D. 72).

Buyer excluded by conduct.

In all these cases a buyer may by his conduct, as by proceeding in the purchase without objecting after he is acquainted with the nature of the defect, become bound to complete his contract, and even forfeit a right to compensation. (*Fordyce* v. *Ford*, 4 Bro. C. C. 494; Sugden's V. & P. 252, 258.) Where a buyer, who had learnt the defect in the title from the abstract, bought up the outstanding estate in fee from the remainderman, this was held dishonest and unjust conduct, and he was compelled to complete the purchase from the tenant by courtesy, who had originally sold, supposing that he had the fee absolute. (*Murrell* v. *Goodyear*, 1 D. F. & J. 432, and 6 Jur. N. S. 356.) But if a buyer resist performance at first on frivolous grounds, but afterwards during the suit, substantial objections are discovered, he may avail himself of them. (*Baskcomp* v. *Phillips*, 6 Jur. N. S. 363.)

Sales of "more or less."

If the extent of the land is misrepresented, though innocently, then, whether the land is sold professedly at so much the acre or not, the buyer is entitled to compensation for a deficiency. (Sugden's V. & P. 269.) Often the extent is described as "about so much," or "by estimation so much," or "so much, be the same more or less;" then it seems certain that a small variance one way or the other is not to be taken into account; but if the variance is more than trifling, the rule is less settled, but I apprehend that much turns upon whether

the mere extent of the land was a material item in the consideration for the property, as an entirety without much regard to its mere extent, may have been that for which the buyer was ready to give the price named. Still, if the variance is very large, it will, even in such a case, be a valid defence. (*Portman* v. *Mill*, 2 Russ. 570; Sugden's V. & P. 269-70.) Of course, the seller, who knows the real extent, cannot name a false one and protect himself by using such words as "more or less." (*Winch* v. *Winchester*, 1 V. & B. 377.) But a buyer who has been in occupation is not, therefore, to be taken as perfectly acquainted with the extent. (*King* v. *Wilson*, 6 Beav. 124.) It is also a common practice in selling land to provide in the contract that misdescription as to extent shall not annul the contract, but be the object of compensation; but this will not entitle the seller, where the extent is much greater, to compel the buyer to complete on payment of a proportionately larger sum, for the error is the seller's fault, and though the buyer might, on additional payment, enforce the contract, yet he is not, therefore, to be made to pay double the price for an estate twice as large as that agreed upon. (*Price* v. *North*, 2 Y. & C. (Ex.) 620.) See *infra*, s. 28, cl. (*c*.)

II. Where the buyer is suing the seller.

Buyer against seller.

If a case of this kind falls within s. 14, then the general rule applies that a buyer may, if he choose, compel a seller who has contracted to sell an estate larger in extent or interest than he has, to convey to him such an estate in extent or interest as he is entitled to with compensation; and clearly, there would be less difficulty as to this than in cases against the buyer, for it is the seller's fault if he did not know precisely what he had got to sell. The real difficulty is in cases falling, or seeming to fall, within s. 15. But cases within either of these sections must be distinguished from cases within s. 18, where the seller's title, though originally imperfect, is yet capable of being made perfect, and special relief is given to a buyer to compel the perfecting of the title.

Buyer taking what he can get.

It is true generally, but not universally, that a buyer may take what he can get, with compensation for what he cannot have. (Sugden's V. &. P. 253.) If one contracts to sell a fee simple, and has only a term of 100 years, the buyer has a right to that term if he think fit. (*Mortlock* v. *Buller*, 10 Ves. 315; *Barker* v. *Cox*, 4 Ch. D. 464.) So, where a seller is bound by the contract, to make certain roads, and is

unable to perform that part of his contract, the buyer may require a specific performance with compensation. (*Peacock* v. *Penton*, 11 Beav. 355.) In one case, the seller of shares which could not be transferred without the consent of a board, was compelled to transfer such interest as he had, though it was left doubtful whether the buyer would thereby become a shareholder. (*Pool* v. *Middleton*, 7 Jur. N. S. 1262.) A case that seems to have gone a long way is that of *Barnes* v. *Wood* (L. R. 8 Eq. 424); there A contracted with B for the purchase in fee of property, in ignorance that B was only entitled to an estate *pour autre vie*, and C (B's wife) was entitled to the remainder in fee on the determination of the particular life. D, with full knowledge of A's contract, took a conveyance from B and C of the property, acknowledged by C so as to pass her interest; and it was held that A was entitled, by way of specific performance, to a conveyance from D of B's interest, with a proportionate abatement of the purchase-money as a compensation in respect to C's interest, which B was unable to bind or convey without her consent. The difference between the interest which A thus got, and what he contracted to have, was certainly considerable, and clearly B could not have forced it upon him; but then it was a difference in interest only, and the conveyance of B's interest in no way affected the interest of others, when it might be otherwise. D had, in fact, clothed himself with the whole interest which B contracted to sell to A, but the notice by which D was affected was limited to such interest as B really had to convey, and, therefore, s. 18 could not be applied to such a case as this, so as to affect the interest of C which she had conveyed to D.

Where A was the owner of one moiety of an estate, and trustee of his son as to the other moiety, and he contracted to sell the whole estate to B, but subsequently sold it to C, in a suit by B against A the court gave him a decree to the extent of A's moiety. The fact that A had subsequently and in breach of his contract sold the land to a third party, having notice, and that if relief were refused to the plaintiff, the land might remain in possession of the third party would not affect the propriety of the exercise by the court of its discretionary power to enforce the contract. Though A might have duly conveyed the whole estate under certain circumstances, such as legal necessity, and such a conveyance might have been good as against the *cestui que trust*, the court held that before decreeing specific performance of the

contract to convey the whole estate, the plaintiff would be bound to prove the circumstances justifying such an act on the part of the trustees. (*Gurusami Sastrial* v. *Ganapatti Pillai*, I. L. R. 5 Mad. 337.)

In another rather strong case, two persons, A and B, sold property to C, of whom A was entitled only to a moiety, subject to a mortgage for its full value, and B had no interest at all, and yet C was allowed to take A's moiety with an abatement of half the purchase-money, the result being that C took the moiety, subject to the mortgage, and A received nothing on the sale. (*Horrocks* v. *Rigby*, 9 Ch. D. 180; *Hooper* v. *Smart*, L. R. 18 Eq. 683; *McKenzie* v. *Hesketh*, 7 Ch. D. 675.) But where a husband and wife agreed to sell the wife's estate in fee simple, the purchaser being aware that the estate belonged to the wife, and the wife afterwards refused to convey, it was held that the purchaser could not compel the husband to convey his interest and accept an abated price. (*Castle* v. *Wilkinson*, L. R. 5 Ch. 534.) If a man professes to be owner of the fee simple, and undertakes to sell it, and it turns out that he had not power to do so, the purchaser not being at the time aware of the difficulty, then the vendor must convey as much as he can, and submit to an abatement. But the case is wholly different where there is no such profession; and here the buyer knew that he could only get what the wife was willing to convey, and failing that, he could not insist on the partial interest of the husband being conveyed, the agreement being by both to convey the whole. (*Ibid.*)

Where this may be refused.

If the difference is not in the quality of the title, but in the quantity of the estate to which the title can be made, and the part as to which there is no title is considerable, it might be inequitable to compel the seller to convey the part to which he has a title. Thus, a seller, for example, could not at the election of the buyer, be deprived of his mansion-house and park to which he could make a good title, whilst a large adjoining estate held and sold with it, would be left on his hands with a proclaimed bad title. (Sugden's V. & P. 262.) There are other English cases in which specific performance has been refused to the buyer against the seller, where the failure of the seller was as to a material part of his contract, but the decisions have not been unquestioned. (See *Harnet* v. *Yielding*, 2 S. & L. 549; Sugden's V. & P. 255; *Thomas* v. *Dering*, 1 Keen 729; Sugden's V. & P. 256; *Wheatley* v. *Slade*, 4 Sim. 126; Sugden's V. & P.

263; *Jones* v. *Evans*, 12 Jur. 664; Sugden's V. & P. 264; and the other way, *Dale* v. *Lister*, 16 Ves. 7; *Milligan* v. *Cooke*, 16 Ves. 1; Sugden's V. & P. 254.) Probably the proviso in s. 15 was framed to meet the difficulties which have thus arisen in English cases. The course was actually adopted in one case, where upon the purchase of a house, &c., it turned out that no title could be made by the seller to one-fourth, which belonged to other persons; and the buyer, who sued for specific performance was held not to be entitled to take the three-fourths to which a title could be made with an abatement, but that he might, upon payment of the whole price, take what the seller could convey. No reasons were given for this decision, and it has been said to be a case upon which it would not be safe to rely. (*Maw* v. *Topham*, 19 Beav. 576; Sugden's V. & P. 257; see *Durham* v. *Legard*, 34 Beav. 611.) The proviso in s. 15 can be applicable only when the buyer is the plaintiff. There are two cases under this section where the seller could not enforce specific performance, *viz.* (1), where the variance in the performance would be substantial, or (2) where it would not admit of compensation. In the *first* case, to give the buyer specific performance is always to destroy all mutuality of remedy between the parties, and will often, in effect, be to make and execute a new contract between them. Still the proviso (subject as its exercise will be to the judicial discretion given by s. 22 II) seems an equitable solution of the difficulties which have arisen in English cases. On the one hand, the seller is bound to know his own title, and yet his mistake may have been an innocent one, and if he had known the truth he might not have been willing to sell at all; and, on the other hand, if the buyer will still insist on specific performance, it is a rough substitute for the mutuality of remedy that the buyer should have to abandon all claim to compensation, or what is the same thing, to an abatement of the agreed purchase-money. The combined effect of the proviso in s. 15, and of s. 14, seems to be that the buyer cannot enforce specific performance *with* compensation, except in a case where the seller could equally have enforced specific performance, *subject to* compensation: in all other cases though the buyer may sometimes have specific performance where the seller could not, it must be *without* compensation. In the *second* case, where the variance (whether substantial or not) does not admit of compensation, it is still more obviously fair that

Application of proviso in s. 15.

the buyer; if he will insist on specific performance where the seller could not have it, must be content to give up all claim to compensation.

Lastly, as to cases in which there has been failure in respect to the *time* of performance. Ordinarily some special time is named in the contract for its performance, or if not, the law will imply that a reasonable time for this purpose was contemplated by the parties.

Failure as to time.

Time is thus always a part of the contract, and, as will be seen, it may or may not be material, or may or may not admit of compensation for delay. The cases on the subject are singularly numerous, and the leading case of *Seton* v. *Slade* (2 L. C. in Eq. 501) turned on this question. Time is not generally deemed in equity to be of the essence of the contract, unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract. (1 Story's Eq. 776.) This may be so, either from regard to the subject-matter of the contract, as where it is the sale of a reversion or of stocks, things that vary with the effluxion of time,—or from regard to the object in view of the parties to the contract, as where a house or building has been sold for the purpose of residence, or of starting a business. (*Hipwell* v. *Knight*, 1 Y. & C. Ex. 415.) Where a business is sold as a going concern, it is of the essence of the contract that the purchaser should, on the day agreed upon, be placed in a position so as to be able to enter and lawfully carry on the business, so that if a license should be necessary for that purpose, it should be effectually transferred to him; and, if in the purchase of a house as a residence, possession by a certain date is made material, possession must be understood to mean possession with a good title shown. (*Day* v. *Luhke*, L. R. 5 Eq. 336; *Cowles* v. *Gale*, L. R. 7 Ch. 12; *Tilley* v. *Thomas*, L. R. 3 Ch. 61.) The mere naming of a date for possession is not enough, if it appear otherwise from the terms of the agreement that a possible postponement of the completion of the contract was contemplated. (*Webb* v. *Hughes*, L. R. 10 Eq. 281.)

It is true that courts of equity have regard to time so far as it respects the good faith and diligence of the parties. But if circumstances of a reasonable nature have disabled the party from a strict compliance, or if he comes, *recenti facto*, to ask for a specific performance, the suit is treated with indulgence and generally with favour by the court. But then, in such cases, it should be clear that

the remedies are mutual; that there has been no change of circumstances affecting the character or justice of the contract; that compensation for the delay can be fully and beneficially given; that he who asks a specific performance is in a condition to perform his own part of the contract; and that he has shown himself ready, desirous, prompt, and eager to perform the contract. Thus, where there is a delay in completing the sale, and the purchaser is thereby prevented from letting to a tenant, the vendor is liable for the damages caused by the loss of such tenant. (*Royal B. P. B. Soc.* v. *Bomash*, 35 Ch. D. 390.) But when the date for the completion of the sale has been fixed, and delay arises owing to a defect in the conveyance and not from the title, time is not of essence. (*Hatten* v. *Russell*, 38 Ch. D. 334).

Even where time is of the essence of the contract, it may be waived by proceeding in the purchase after the time has elapsed; and if time was not originally made by the parties of the essence of the contract, yet it may become so by notice, if the other party is afterwards guilty of improper delays in completing the purchase. (1 Story's Eq. 776; and see Sugden's V & P. ch. 6.) The general rule that a party cannot call for specific performance unless he has shown himself ready, desirous, prompt, and eager, is specially applicable where the subject-matter of the contract is of a speculative and fluctuating value. The possession by a purchaser under a contract being a continuous assertion of his right to its performance may obviate the consequence of delay; but then the possession must be due solely to the contract; and where a tenant is in possession as such, and then exercises an option of purchase, as possession is there imputable to the tenancy, it is not of a character to obviate delay. (*Mills* v. *Haywood*, 6 Ch. D. 202; *Green* v. *Levin*, 13 Ch. D. 589; Sugden's V & P. 227.)

Damages for delay.

As to the measure of damages for delay, ordinarily the buyer is entitled to the rents and profits, and the seller to interest on the purchase-money from the date fixed for completion, even though the money were lying dead, if the seller was not in fault for the delay or the buyer gave no notice that the money was idle; but if the seller was in default, and the money was actually and fully appropriated, and the seller had notice it was lying dead, he cannot claim interest, or higher interest than the money was actually earning though there was a stipulation to pay 5 per cent. from the date fixed for completion, but the delay was due to the

vendor. (*In re Monckton and Gilzean*, 27 Ch. D. 555; *De Visme* v. *De Visme*, 1 M. & G. 346; *Calcraft* v. *Roebuck*, 1 Ves. Junr. 227. On this subject see Sugden's V. & P. ch. 17.) If no date was fixed, then interest is payable from the time the buyer took or might prudently on a good title being shown, have taken possession or received the rents and profits; except in the case of a reversion, when (as the life estate is always wearing out) it is always payable from the date fixed for completion. (*Bailey* v. *Collett*, 18 Beav. 179.) If the buyer takes possession before completion, he must pay interest from that date, though he makes no profit, by rent or otherwise, out of the land meanwhile. (*Ballard* v. *Shutt*, 15 Ch. D. 122.) If the interest exceeds the rents and profits, and the seller is in default, he must anyhow take the latter until a good title is shown and then only interest instead. (*De Visme* v. *De Visme*, 1 M. & G. 346.) If there was no wilful default, then the express terms of any stipulation govern the respective payments. (*Palmerston* v. *Turner*, 10 Jur. N. S. 577; Sugden's V. & P. 523.) If during the delay in making out the title there has been loss from deterioration or mismanagement, not due to the buyer, he must be allowed compensation, and if he has paid his purchase-money, then from that date interest on such compensation. *Foster* v. *Deacon*, 3 Madd. 394; *Ferguson* v. *Tadman*, 1 Sim. 530.) (If by the wilful default of the seller rent has not been received by him and the land has been waste, the purchaser may set-off against the interest payable to him the rent that might have been received and the loss by deterioration. (*Phillips* v. *Silvester*, L. R. 8 Ch. 173; see also *Thomas* v. *Buxton*, L. R. 8 Eq. 120.) The buyer takes or is paid for common timber blown or cut down after the contract, and the seller cannot claim money afterwards laid out on improvements. (*Magennis* v. *Falcon*, 2 Moll. 584; *Clare Hall* v. *Harding*, 6 Hare, 296.) Unless otherwise stipulated, expenses and outgoings are borne by the seller down to when the buyer might prudently take possession, that is, when a good title is shown. (*Carrodus* v. *Sharp*, 20 Beav. 56.) When there was a stipulation to pay interest from a date named and the vendor left the country two days before the date fixed, the purchaser was held not to be liable to pay interest. (*In re Young* v. *Harston*, 31 Ch. D. 168.) But in the case of an agreement to pay interest "except for the wilful nelgect or default of the vendor," the purchaser cannot set apart a sum and give notice thereof to the vendor.

16. When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.

Specific performance of independent part of contract.

This section assumes that the parts of the contract are severable, and that the performance of one distinct part becomes either impossible or unlawful. It differs from ss. 14 and 15 in thus including the element of illegality; in those sections it is an inability as to a part of the contract that is alone contemplated; in this is included the case where a part of the contract though it can be, yet ought not to be specifically performed. It recognises, therefore, the distinction between divisible and indivisible illegal contracts. Thus where there are legal and illegal considerations for the same entire contract or promise, the whole contract is void. And if there is one entire consideration for two several contracts, and one of these contracts is for the performance of an illegal act, the whole is void. But if there are several considerations for separate and distinct contracts, or for separate and independent covenants in the same instrument, and one is good and the other bad, the one may stand and be enforced although the other fails. The invalidity of the one will not necessarily induce the destruction of the other. This is what is really involved by, though not so clearly stated in s. 24, Indian Contract Act, that "If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void."

How it differs from ss. 14 and 15.

But I do not think that the words "ought not," in s. 16, are limited to the ground of illegality; it may be that in accordance with the other provisions of this chapter, one independent part of a contract ought not to be specifically performed, while the rest ought to be; for s. 16 will include any contract the parts of which are separate and independent. No Illustrations of this section are given, but the latter part of Illustration (*b*) to s. 14 might, according to the circumstances of the case, be an example; if, as there, a house and furniture

Examples under the section.

are sold together, and the furniture is to be taken at a valuation it might be that as the considerations would be separate so the two objects would be independent; but it might also be that the furniture, though to be separately valued, was so essential to the known purpose for which the house was bought, that the two parts are not independent. The two following cases, one on behalf of the purchaser and the other of the seller, will serve as illustrations. Where a house and land were sold by private contract for £1,000, but the court considered that there were two distinct contracts, one of the house at £300, and the other of the land at £700, and it did not appear that they were necessary to the occupation of each other, and the purchase-money was paid, and the purchaser was evicted from the house for want of title in the sellers, before the conveyance was completed, but he had built upon the land, to which the title was good; he was allowed to retain it, and enforce a conveyance of it, and to recover the money which he had paid for the house. So, if the part to which the seller has a title was the purchaser's principal object, or equally his object with the part to which a title cannot be made, and is itself an independent subject, and not likely to be injured by the other part, equity will compel the purchaser to take it at its separate price; and in these cases the subject for inquiry is, whether the part to which a title cannot be made, is separate and independent, or is material to the possession and enjoyment of the rest of the estate. (Sugden's V & P. 260-1.)

A rather striking example was a case in which defendant had agreed to grant a lease of a plot of land to the plaintiff upon his building thereon a house of a certain value, to be insured in their joint names in a particular office; but on any default by the plaintiff, the agreement was to be void, and the defendant might re-enter. There was, however, a further stipulation that the plaintiff was to have the option of purchasing the fee within two years. The plaintiff built the house, but insured it in the wrong office and in his own name only. He then sued to enforce his right to purchase; and it was held that though by his own default his right to the lease was gone, his right to purchase the fee under the alternative part of the agreement was so independent that he was entitled to specific performance of this part of the contract. (*Green* v. *Low*, 22 Beav. 625.) But whether a contract is divisible or not is a question of general law not peculiar to specific performance.

As in a case within this section the parts of the contract are, by the hypothesis, separate and independent, nothing is here said as to compensation or conditions in decreeing specific performance, for as to the part that "cannot or ought not to be specifically performed," the decree will be what would be appropriate had the part been a several contract by itself.

Decree under this section.

17. The court shall not direct the specific performance of a part of a contract except in cases coming under one or other of the three last preceding sections.

Bar in other cases of specific performance of part of contract.

It is difficult to suggest any other cases of performance in part; but perhaps the object of the section was to prevent that remodelling of contracts which has been sometimes carried to excess in English cases. (Fry's Spec. Perf. (2nd ed.) 436.)

18. Where a person contracts to sell or let certain property, having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this chapter) has the following rights :—

Purchaser's rights against vendor with imperfect title.

This section is limited to cases in which the buyer or lessee sues the seller or lessor, and the latter is at the time of suit able to make a perfect title, though at the time of contract he had only an imperfect title, or even no title at all, for I apprehend that this case must also be included. The term "property" being general, the relief will not be limited to immoveable property, though it will be more usually applied to such. The exception introduced makes applicable to these cases all the provisions of the law which either preclude or qualify the specific performance of contracts generally.

Scope of section.

(*a*) if the vendor or lessor has subsequently to the sale or lease acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest;

Illustrations.

An example under this clause is where A contracts to sell an estate to B absolutely, but at the time has only a contingent remainder in fee; and then the contingency happens; A is concluded by his prior contract and must convey the fee to B. Whatever interest the seller himself acquires in the estate subsequently to the conveyance, he will be compelled to convey to the purchaser, so as to make good the conveyance to him. (*Ascough* v. *Johnson*, 2 Vern. 66; Sugden's V. & P. 447.) Or to take an old case, where A demised land, not being his own, to B for 6 years, and C, the true owner, then demised it to A for 21 years, and A then re-demised it to C for 10 years; the lease by A to B when he had nothing in the land, was good against him by conclusion, and as soon as A got the land from C his interest in it was bound; and when A re-demised it to C, then was C concluded also, for he was bound as privy, because he came in under A; and so B's lease shall prevail against both A and C. (*Rawlin's case*, 4 Co. Rep. 52.) In the technical words of English law, the interest, when it accrues, feeds the estoppel; or, in the simpler words of a more modern judgment: "It is an undeniable proposition that when a party enters into a contract without the power of performing that contract, and subsequently acquires the power of performing that contract, he is bound to do so." (*Carne* v. *Mitchell*, 10 Jur. 909, 912.) Another authority says:—"If a man sell an estate to which he has no title, and after the conveyance acquire the title, he will be compelled to convey it to the purchaser. But this is said to be a personal equity attaching on the conscience of the party, and not descending with the land, and therefore, if the vendor do not in his lifetime confirm the title, and the estate descend to the heir-at-law, he will not be bound by his ancestor's contract. This opinion, however, deserves great consideration." (Sugden's V. & P. 297, 612.) Formerly the Indian courts were disinclined to apply to Hindu conveyances the principle of English law which allowed a subsequently acquired interest to feed the estoppel. This section has, however, extended the principle to this country. (*Ram Nirungun Singh* v. *Prayag Singh*, I. L. R. 8 Cal. 744; *Virayya* v. *Hanumanta & others*, I. L. R. 14 Mad. 459.) Clearly, I think, in India, when the relief would be enforced against the vendor, it would be enforced also against any party claiming under him as described in s. 27, cls. (*b*) and (*c*). So, if a seller of a leasehold usually renewable, has acquired an interest by contract with

the lessors at the time he made the agreement for sale, that interes would pass to the purchaser, although the contract was simply to sel the leasehold. If there was no such contract, but a renewal is obtain ed subsequently to the sale, but before the assignment to the purchase the latter would also clearly have a right to claim the renewed leas though in this case the purchaser must pay the expenses of th renewal, and in the former case also, unless he really bought the whol interest at the price named, including the benefit of the contrac for renewal. (*Munro* v. *Taylor*, 8 Hare 51; Sugden's V. & P. 252.

A converse case.

It may be useful to mention the converse case to one within thi clause; where the vendor having an imperfec title, sold the estate absolutely, supposing tha he had the fee, and the purchaser availing himself of the knowledg of the defect which he acquired during the contract, bought up th interest of the remainderman, and thus would, with the conveyanc from the vendor, acquire the perfect title for which he had contracted the purchaser was compelled to complete his purchase, but was allowe to deduct what he had paid to the remainder-man. (*Murrell* v. *Good year*, 1 D. F. & J. 432, and 6 Jur. N. S. 93; *Hume* v. *Pocock*, L. R 1 Eq. 662.)

(*b*) where the concurrence of other persons is necessar to validate the title, and they are bound to convey at th vendor's or lessor's request, the purchaser or lessee ma compel him to procure such concurrence;

It should be noted that the other person must be one *bound* to d the act in question, that is, one against whom the vendor or lesso has a legal right to sue for its performance. This limitation effec tually disposes of a number of impolitic decisions in English equit where the question has been whether, if a husband covenants fo valuable consideration that his wife shall join him in the conveyanc of an estate, in which he has an interest, contingent or immediate and so validate the title, he can be decreed to procure her concurrence This is, in effect, to seek by the indirect action of a decree against th husband to compel the wife to give an assent which she is not legall bound to give. Under this clause, specific performance in such a cas should be refused, and the purchaser left to his remedy by damage against the husband. (1 Story's Eq. 731—735.)

(c) where the vendor professes to sell unincumbered property, but the property is mortgaged for an amount not exceeding the purchase-money, and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a conveyance from the mortgagee ;*

It must be noted that the clause assumes that the vendor *professes* to sell the property as unincumbered, that is, he has represented it to be such. The vendor is bound to deliver to the purchaser any instrument by which incumbrances were created, or on which defects in the title arise, or to acquaint him with the facts, if they do not appear on the title-deeds. If a seller knows and conceals a fact material to the title, relief cannot be refused to the purchaser. But with the exception of a vendor, or his agent, suppressing an incumbrance or a defect in the title, a purchaser cannot obtain relief against a vendor for any incumbrance or defect in the title to which his covenants do not extend; and, therefore, if a purchaser neglect to have the title investigated, or his counsel overlook any defect in it, he may be without a remedy. (Sugden's V. & P. 5, ch. 13, s. 2.) The maxim *caveat emptor* applies to a negligent purchaser in respect to incumbrances as well as to other defects, and he is bound to make inquiry regarding such where he is affected by notice of them. But the maxim is one of wide application, and it must suffice here merely to note that this clause recognises its applicability by limiting the relief to where the vendor professes that the property is unincumbered, and this, of course, he may do either by a false statement, or by silence when he was bound to speak.

Maxim of *caveat emptor*.

I think that this clause was intended to be limited to the case where the transaction between the parties is still incomplete, by the conveyance not having been made, or the purchase-money not paid, or both. If, after the transaction has been completed, the purchaser is charged with a prior incumbrance, his remedy (if any) against the vendor would be under the ordinary procedure for breach of contract, and not under this Act. The numerous cases on this part of the subject cannot therefore be here noticed.

Limit of the clause.

Conveyance from mortgagee.

The words, "obtain a conveyance from the mortgagee," may, and probably do, mean only a conveyance or transfer of such interest as the mortgagee had as such; and they do not necessarily imply that the English rule that the legal estate is in the mortgagee, and, on a redemption, it must be reconveyed and vested in the mortgagor, is recognised by this clause as applicable or in force in respect to mortgages in India.

(*d*) where the vendor or lessor sues for specific performance of the contract, and the suit is dismissed on the ground of his imperfect title, the defendant has a right to a return of his deposit (if any) with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs on the interest of the vendor or lessor in the property agreed to be sold or let.

In the preceding clauses it is the purchaser or lessee who is the plaintiff suing to compel the vendor or lessor to perfect the title which was contracted for; in this clause it is the vendor or lessor who is the plaintiff suing to enforce specific performance, and failing by reason of his imperfect title, and then instead of the suit being simply dismissed with costs, the defendant (the purchaser or lessee) is entitled to the special relief of a decree for the return of his deposit with interest, and his costs, together with a lien for the same on the property agreed to be sold or let.* In *Howe* v. *Smith* (27 Ch. D. 89) a purchaser paid a deposit but failed to complete the purchase. The vendor resold the property to another person for the same sum. It was held that he was nevertheless entitled to retain the deposit as it was a guarantee for the due completion of the sale. That is the ordinary rule as to a deposit unless there is a stipulation to the contrary. If a purchaser has lost his right to specific performance and also to damages for breach of the contract, he ordinarily loses his deposit. But a purchaser would be refused specific performance and yet be entitled to have back his deposit. The purchaser need not have expressly refused to complete the purchase; the point is whether his conduct indicates in substance

* For form of decree in such case see *Turner* v. *Marriott*, L. R. 3 Eq. 744; on forfeiture of deposit, *In re Parnell*, L. R. 10 Ch. 512; where a purchaser had persistently sought to evade a judgment for specific performance, *Morgan* v. *Brisco*, 31 Ch. D. 216.

a refusal. See also *Soper* v. *Arnold* (35 Ch. D. 384), which was an action to recover a deposit. The title had been accepted and the deposit forfeited and afterwards a defect was discovered in the title. It was held that the deposit could not then be recovered. In *Babu Bindeshri P.* v. *Mahant J. G.* (14 Ind. Ap. 173) which was a case under this Act, specific performance was refused as the purchaser had unduly insisted on a warranty of title and so caused delay. This lien must, of course, be limited to such interest as it may turn out that the plaintiff has in the property; and the relief hereby given is not necessarily the measure of damages to which a purchaser or lessee would be entitled, should he, on the failure of the title, sue as plaintiff for breach of the contract to sell or let. Ordinarily on a contract for the sale of land going off for want of title, damages for the loss of the bargain are not recoverable, but they may be; and on the breach of a contract for a lease, they ordinarily are.

Power to award compensation in certain cases.

19. Any person suing for the specific performance of a contract, may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.

If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

Compensation awarded under this section may be assessed in such manner as the court may direct.

EXPLANATION.—The circumstance that the contract has become incapable of specific performance, does not preclude

the court from exercising the jurisdiction conferred by this section.

Illustrations

of the second paragraph :—A contracts to sell a hundred maunds of rice to B. B brings a suit to compel A to perform the contract or to pay compensation. The court is of opinion that A has made a valid contract and has broken it, without excuse, to the injury of B, but that specific performance is not the proper remedy. It shall award to B such compensation as it deems just.

of the third paragraph :—A contracts with B to sell him a house for Rs. 1,000, the price to be paid and the possession given on the 1st January 1877. A fails to perform his part of the contract, and B brings his suit for specific performance and compensation, which is decided in his favour on the 1st January 1878. The decree may, besides ordering specific performance, award to B compensation for any loss which be had sustained by A's refusal.

of the Explanation :—A, a purchaser, sues B, his vendor, for specific performance of a contract for the sale of a patent. Before the hearing of the suit, the patent expires. The court may award A compensation for the non-performance of the contract, and may, if necessary, amend the plaint for that purpose.

A sues for the specific performance of a resolution passed by the Directors of a public company under which he was entitled to have a certain number of shares allotted to him, and for compensation for the non-performance of the resolution. All the shares had been allotted before the institution of the suit. The court may, under this section, award A compensation for the non-performance.

In a suit to enforce a contract to place the plaintiff in possession of land, and to declare his right thereto, the plaintiff may, under this section, claim as an alternative, for compensation against the defendant for his breach of contract, any premium paid to him by the plaintiff. (*Rajdhur Chowdhry* v. *Kali Krishna Bhuttacharje*, 11 C. L. R. 330.) So, a lessee who, according to the terms of his lease, was entitled to be put in possession, and who could not obtain possession might sue either for specific performance, or to get back his money. *Munnee Dutt Sing* v. *William Campbell*, 12 W. R. 149.)

English rule as to damages.

In English courts of equity, the old course used to be that a suit for specific performance was not entertained at all, except where the remedy at law by damages was inadequate or inappropriate; and when

entertained, if specific performance was, on other grounds, not decreed, the dismissal of the suit was without prejudice to the plaintiff's right to damages at law. It needed special legislation to enable equity courts to award damages or compensation where it turned out to be the more proper form of relief. (See 21 & 22 Vict., c. 27, s. 2.) Hence, probably, the precaution of here inserting an express provision on this subject, though this section is really a necessary result of the constitution of our courts in India. It must also be read in connection with s. 29, which expressly makes the dismissal of a suit for specific performance a bar to another suit for damages for breach of contract.

In a suit to enforce a contract to put the plaintiff in possession of land and to declare his right thereto, the plaintiff may in the alternative ask for a decree for a return of *salami* paid by him. The alternative claim for the *salami* would be treated as a claim for compensation for breach of the contract, and the plaintiff would be entitled to join such a claim to the main claim for specific performance. (*Rajdhur Chowdhry* v. *Kali Krishna Bhuttacharji*, 11 C. L. R. 330.)

Damages can only be given in lieu of specific performance where specific performance could have been given. In those cases where specific performance would have been feasible and proper, but there were reasons why it would be better to give damages in lieu, the courts would decree the latter form of relief. (*Lavery* v. *Purcell*, 39 Ch. D. 519.)

Second paragraph.

The Illustration of the *second* paragraph is an example of a common contract for the breach of which damages are the only appropriate remedy, and no one properly advised would bring a suit for specific performance of such a contract, for it falls within s. 21, cl. (*a*); but the suit once brought must be fully and finally disposed of. This paragraph will also apply where specific performance for any reason cannot be had, though the suit was properly framed for the purpose. (*Wilson* v. *N. & B. Ry. Co.*, L. R. 9 Ch. 279.) In awarding compensation under this paragraph, the court will apply the measure of damages appropriate to the particular kind of contract sued upon. But where a lessee claims compensation in respect of a defect of title which he might have discovered before he took his lease, and there was no contract as to compensation, his claim will fail. (*Clayton* v. *Leech*, 41 Ch. D. 103.) In lieu of specific performance, a vendor may obtain a declaration of his right to deposit and to resell the property. (*Kingdom* v. *Kirk*, 37 Ch. D. 141.)

The Illustration of the *third* paragraph shows how this provision of s. 19 is distinguishable from the provision in s. 14 for decreeing specific performance in part with compensation in money for the deficiency. Here the court is enabled, while decreeing specific performance of the general stipulations of a contract, in fact, of the contract as a whole, to award also damages for the breach of some incidental stipulation, or for some incidental loss due to the misconduct of the defendant. (*Lillie* v. *Legh*, D. & J. 204; *Jaques* v. *Millar*, 6 Ch. D. 153; 1 Story's Eq. 737*a*.)

Third paragraph.

It may be convenient to notice here a general rule in English equity which seems to be impliedly recognised by this chapter; and that is, that though a decree for specific performance may be coupled with an award of compensation, it will never be coupled with an award of indemnity. It is a settled rule that a purchaser is not bound to accept a defective title with indemnity, nor can a vendor be compelled to convey something less than he has sold with an indemnity against the risk of eviction. But, of course, parties may expressly contract for an indemnity. Thus, where the estate sold is comprised with others in an original lease, under which the lessor has a right to re-enter for breach of covenants, so that the purchaser might be evicted without any breach on his part, then, apart from express contract, neither the purchaser would be bound to accept, nor the vendor to convey the estate with an indemnity. (Sugden's V. & P., ch. 10, s. 2, p. 254.) The reason is obvious: specific performance, with compensation, is a final settlement of the matter between the parties; specific performance with an indemnity is not, but expressly leaves the door open for future litigation.

Compensation and indemnity distinguished.

The object of the *fourth* paragraph is, I presume, to enable the court to fix the amount of compensation by directing an inquiry, or taking an account, or issuing a commission for that purpose, instead of itself at once assessing the damages.

Fourth paragraph.

The Illustrations of the Explanation show how contracts, such as are here contemplated, differ from contracts becoming impossible within the meaning of s. 56, Indian Contract Act. Under the latter section the impossibility is one not arising from any default of the party, and even then, if the

Explanation.

promisor knew, or reasonably might have known or expected, that the act was or would become impossible before the time for its performance would arise, and the promisee had not the like knowledge, he must make compensation for non-performance. But here the incapacity to perform is simply one result of the default of the party, for he was quite capable of performing his contract if he had only chosen to adhere to it; and, therefore, he must make compensation up to the full measure of damages for which he would be liable on a simple refusal without any regard to his capacity. The object of the Explanation is to show that, in a suit for specific performance, the mere fact that it has become impossible does not preclude a decree for damages. But it should be noted that, in the first Illustration, if the patent was known to have expired before the suit was brought, it would be wrong practice to frame the plaint for specific performance; but in the second Illustration the plaintiff is not bound to know whether defendants may be, or continue to be, incapable of performing their contract, and it would be right practice to frame the plaint for specific performance. This Illustration is taken from *Ferguson* v. *Wilson* (L. R. 2 Ch. 77); but, as in English practice so under this section the case must, at the time of suit, be one adapted for the relief of specific performance. The object is to prevent a defendant from escaping scot-free by showing in defence his own default, as that he has since sold the property to another for value without notice, or that he never had any title to it. (*Bowman* v. *Hyland*, 8 Ch. D. 588.)

Liquidation of damages not a bar to specific performance.

20. A contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.

Illustration.

A contracts to grant B an under-lease of property held by A under C, and that he will apply to C for a license necessary to the validity of the under-lease, and that if the license is not procured, A will pay B Rs. 10,000. A refuses to apply for the license, and offers to pay B the Rs. 10,000. B is nevertheless entitled to have the contract specifically enforced if C consents to give the license.

This provision seems only a proper deduction from s. 74, Indian Contract Act. By this latter section the distinction known to English law between penalties and liquidated damages was substantially abrogated; since a party for breach of contract can only recover reasonable compensation, not exceeding any amount named in the contract to be paid on a breach. Hence, in either case the party in default is liable only for a reasonable amount of damages; and thus the old doctrine of penalties is virtually at an end. But, even by English law, it was always the rule that the penalty being inserted to secure performance, a party could never treat it as an option for him to pay the penalty and decline performance; and much more would it be inequitable, under Indian law, to allow the party in default the option of paying the penalty. But English courts of equity have gone further, and look to the substance of the transaction and the primary object of the parties, disregarding the mere form or character of the instrument. Thus it is immaterial whether in form the contract is to convey certain land or do some act, with an amount named to be paid on default; or whether it is in form a bond to pay such an amount, with a condition that it be void on the conveyance of the land at a certain price; for equity deems this an agreement to convey the land at all events, and, if otherwise a proper case, specific performance of the conveyance will be enforced. (1 Story's Eq. 715.) But care must be taken not to mistake the substance of the transaction; for such a case as that put in s. 20 is to be distinguished from where the real intent of the contract is that a person may, if he chooses, do certain acts upon payment of a certain sum of money; then, on the one hand, equity will not restrain the doing of such acts, and on the other hand, if they are done, the sum named must be recoverable. (*French* v. *Maccale*, 2 D. & War. 274; *Rolfe* v. *Paterson*, 2 Bro. P. C. 436.) So also must be distinguished an alternative obligation, where a party promises disjunctively to give or to do one of two or more things, so as by giving or performing one of them he may be acquitted of all; for then the obligor may elect which of them he will give or do. In such case, if one alternative always was, or afterwards becomes (except by the act of the obligee), impossible or void, the obligor is bound to the performance of the other. Further, there may be a contract which is primary and single, but which provides for more than one mode of payment, as by paying

Penalties and liquidated damages.

Alternative agreements.

rent in money or in kind; then the obligation is single, and only the mode of solution alternative; the option is with the debtor, and it is neither a case of penalty, nor of liquidated damages. (Colebrooke on *Oblig.* ss. 204, 244—8.)

(*b*) *Contracts which cannot be specifically enforced.*

Contracts not specifically enforceable.

21. The following contracts cannot be specifically enforced :—

The most convenient way of treating this section will be by taking each clause and its Illustrations separately.

(*a*) a contract for the non-performance of which compensation in money is an adequate relief;

Illustrations.

A contracts to sell, and B contracts to buy, a lakh of rupees in the four per cent loan of the Government of India :

A contracts to sell, and B contracts to buy, 40 chests of indigo at Rs. 1,000 per chest :

In consideration of certain property having been transferred by A to B, B contracts to open a credit in A's favour to the extent of Rs. 10,000, and to honour A's drafts to that amount.

The above contracts cannot be specifically enforced, for, in the first and the second both A and B, and in the third A, would be reimbursed by compensation in money.

This clause is the reverse of the reason that serves as the foundation of the jurisdiction to decree specific performance; but as we have seen (*ante*, p. 110), it is justifiable rather on the score of general convenience than of rigid equity. The first and second Illustrations of the rule are obvious enough: as soon as ever there has arisen a breach of contract, A may sell to, or B may buy from, some one else what the other party has contracted to buy or sell, and may recover from such party the loss consequent upon his default, and to such cases the general rule applies that the plaintiff whose right has thus been infringed, is entitled at least to nominal damages, though all actual damage is disproved. But in the third Illustration the measure of damages is not so obvious, nor that any amount legally recoverable would be a compensation. A might be a trader in a distant country and B a banker elsewhere, with whom A had deposited large sums in

Government bonds as security, and the dishonouring of A's drafts by B might lead to the utter disorganization and ruin of A's business. But it is clear that the only practicable remedy in such a case must be compensation in money, and this must be limited by the rules as to the legal remoteness of damages. An analogous example is where a banker, having funds of his customer in hand, refuses to cash his cheques when duly presented; and for this at least nominal damages are recoverable. (*Marzetti* v. *Williams*, 1 B. & Ad. 415.) And for such a refusal substantial damages, without proof of actual damage, may also be given, especially when the customer is a trader, the measure being what is a reasonable compensation for the injury done to the plaintiff's credit. (*Rollins* v. *Steward*, 14 C. B. 595.) So, it has been held that there will be no specific performance of a contract to lend a sum of money (*Sichel* v. *Mosenthal*, 8 Jur. N. S. 275); nor of an agreement unconnected with property. (*Rigby* v. *Connol*, 14 Ch. D. 487.)

When a bond for money has once been executed, the plaintiff, if the defendant has retained the bond, should sue for the recovery of the money. In the case of *Maya Ram* v. *Prag Dat* (I. L. R. 5 All. 44) the plaintiff-mortgagee alleged that the defendant-mortgagor executed a mortgage in favour of the plaintiff in consideration of money due, and that the defendant having delivered the deed to the plaintiff and having promised to get it registered, subsequently took it back to get it registered but refused to do so. The plaintiff sued to have a fresh hypothecation-bond executed by the defendant and to have the deed so executed duly registered. The court held that the suit was barred under this clause inasmuch as the plaintiff would be adequately compensated by a money-decree.

Though an assignment cannot at law pass future property, a court of equity may enforce it as a contract for value. So, where a mortgagor assigned to the mortgagee "all moneys of or to which he then was or might during the security become entitled, under any settlement, will, or other document, either in his own right, or as the devisee, legatee, or next of kin of any person," and he subsequently became entitled under a will to a share of the personal estate of the testator, the court held that the assignment of the after-acquired property was divisible. And although it was said that the general assignment of all property to which the mortgagor might become entitled might be too wide, the assignment for valuable consideration of all moneys to which he should become entitled under a will, operated as a contract which

the court would enforce, and that the share of the personal estate of the testator was accordingly included in the mortgagor's security. (*In re Clarke, Coombe* v. *Carter*, 36 Ch. D. 348.)

(*b*) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms ;

Illustrations.

A contracts to render personal service to B :

A contracts to employ B on personal service :

A, an author, contracts with B, a publisher, to complete a literary work.

B cannot enforce specific performance of these contracts.

A contracts to buy B's business at the amount of a valuation to be made by two valuers, one to be named by A and the other by B. A and B each name a valuer, but before the valuation is made, A instructs his valuer not to proceed :

By a charter-party entered into in Calcutta between A, the owner of a ship, and B, the charterer, it is agreed that the ship shall proceed to Rangoon, and there load a cargo of rice, and thence proceed to London, freight to be paid, one-third on arrival at Rangoon, and two-thirds on delivery of the cargo in London :

A lets land to B, and B contracts to cultivate it in a particular manner for three years next after the date of the lease :

A and B contract that, in consideration of annual advances to be made by A, B will for three years next after the date of the contract grow particular crops on the land in his possession and deliver them to A when cut and ready for delivery :

A contracts with B that, in consideration of Rs. 1,000 to be paid to him by B, he will paint a picture for B :

A contracts with B to execute certain works which the court cannot superintend :

A contracts to supply B with all the goods of a certain class which B may require :

A contracts with B to take from B a lease of a certain house for a specified term, at a specified rent, "If the drawing-room is handsomely decorated," even if it is held to have so much certainty that compensation can be recovered for its breach :

A contracts to marry B.

The above contracts cannot be specifically enforced.

Here the reason for refusal is the practical incapacity of a court to execute in such cases a decree for specific performance. Its machinery is necessarily limited, and though it might possibly, as in the particular cases within s. 11, enforce its decree by attaching the person and property of the defendant, yet the cases covered by this clause are very varied and numerous, and upon a balance of convenience the remedy by damages (the measure of which, in most of the cases, is tolerably precise) is the more appropriate and efficient relief. If A makes an agreement with B that the latter shall enter into an agreement with C, and B refuses to carry out his promise, A may obtain damages against B in lieu of specific performance. (*Foster* v. *Wheeler*, 38 Ch. D. 130.)

With regard to the first three Illustrations, it is not very clear why they are separated from the nine other Illustrations, by the words, "B cannot enforce specific performance of these contracts," instead of all being alike included under the general clause at the end, "the above contracts cannot be specifically enforced."

The first and second Illustrations are merely the converse of each other, and it would seem to have been enough to have said that a contract for personal service cannot be specifically enforced on either side; though the law has not always been so. In the third Illustration the only available relief for A against B would be damages, for in the case put, B is not bound to do any act as to publish what A may write for him. The general clause at the end of the Illustrations, strictly construed, would mean that the contracts in the last nine Illustrations cannot be specifically enforced on either side; and it thus suggests, especially when coupled with the difference in the form of the clause at the end of the third Illustration, that it was intended to recognise the English doctrine of the mutuality of remedy in cases of specific performance. But from the history of this Act, we learn that this doctrine was purposely eliminated, on the ground that it would introduce a principle which found its place in English courts of equity rather from a desire for symmetry than from its inherent utility. It will be useful briefly to notice what that doctrine is, or perhaps rather used to be. It may be thus stated: a contract to be specifically enforced must be mutual,—that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other. When-

English doctrine of the mutuality of remedy.

ever, therefore, whether from personal incapacity, the nature of the contract, or any other cause, the contract is incapable of being specifically enforced against one party, that party is equally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former. [Fry on S. P. (2nd ed.) 201.] A contract may in its nature be such that on the one side a certain act is to be performed, and on the other side a certain sum is to be paid; and assuming that act to be one as to which specific performance can properly be enforced, the party liable to it was also allowed by the English courts to sue in equity, though his only relief was the purely legal one of damages. (1 Story's Eq. 723.) This application of the doctrine was due only to the severance of equitable and legal remedies: and in our courts in India in such a case no question could arise. In the sixth Illustration, it would be quite practicable to enforce specific performance of the contract at the suit of B against A, though impracticable to do so at the suit of A against B; and therefore in such a case an English court would have refused specific performance to B, equally as it would, or rather could not help doing to A. But in our courts in India, in such a case as that put in the sixth Illustration, it is necessary to construe the general words of the clause at the end of the Illustrations, so as to apply only (as indeed they are capable of being made to do) to that part of the contract which is to be performed by B. The case of the artist in the eighth Illustration is so analogous to that of the author in the third Illustration that it is difficult to suggest any distinction between them, or why a different form of words, as to the contracts not being enforced, should have been employed. In the fifth Illustration both sides of the contract are equally incapable of being specifically enforced. The seventh illustration is very similar to the sixth: the acts agreed to be done by B could not be enforced, but A might very well be compelled to pay annually the sum agreed to be advanced; though then the relief would be one sounding in damages. In both these Illustrations the limit of three years is merely inserted to keep the cases free from the application of clause (*g*) of this section. I so fully agree that, in courts constituted as ours are in India, the doctrine of the mutuality of remedy ought not to be acted upon, that I can only regret that its recognition should not have been made more

The fifth to eighth Illustrations to clause (*b*).

distinctly impossible. Non-mutuality is not a bar to specific performance when both parties knew that the contract could not be enforced till the occurrence of a contingent event. (*Wilson* v. *Dunn*, 34 Ch. D. 569.)

The fourth Illustration is taken from the case of *Vickers* v. *Vickers* (L. R. 4 Eq. 529), and is certainly a strong case. The rule is as old as Justinian, that if in a contract the price is to be fixed by a person or persons named, or to be selected by the parties, it is not competent for a court to substitute any others for that purpose. But the strong point in the case is that one party is here allowed to avail himself of his own wrong to defeat his engagement. The Roman law did not, expressly at least, carry its rule thus far. The reason of the rule is that it is of the essence of the contract that the price should be fixed by the very persons named or to be selected, and till this is done, there is no price, and therefore no complete contract; and hence in the words of clause (*b*) the court "*cannot* enforce" its material terms. The English rule is thus adopted to its full extent. But where L had been named by both parties as valuer, and one of them prevented his acting, this was held a wrong which might be restrained. (*Smith* v. *Peters*, L. R. 20 Eq. 511.)

The fourth Illustration to clause (*b*).

But there is another similar class of cases which must be distinguished. Thus if the land, &c., is sold at a sum fixed, but the plant or fixtures are to be valued by certain persons, the latter is a subsidiary stipulation, and will not prevent specific performance. (*Jackson* v. *Jackson*, 1 Sm. & G. 184; *Richardson* v. *Smith*, L. R. 5 Ch. 648.) And generally, if the contract is in substance to sell at a fair price, and the mode of ascertainment, though indicated, is subsidiary and non-essential, the court will execute the contract (Fry on S. P. 154; Sugden's V. & P. 238); for if the contract be incomplete through the default of the defendant, and the court *can* remedy the incompleteness, it will do so. (*Dinham* v. *Bradford*, L. R. 5 Ch. 519.) The distinction between the two classes is real, though sometimes rather fine, as where, in a contract for granting an annuity for three lives to be named, on the defendant's default, the plaintiff was allowed to nominate three lives, and so enforce the contract. (*Pritchard* v. *Ovey*, 1 J. & W. 396.)

Similar cases distinguished.

Ninth Illustration to clause (*b*).

By the ninth Illustration, where "A contracts with B to execute certain works which the court *cannot* superintend," the law is left in much the same uncertainty as the numerous and conflicting decisions in English equity on contracts to build and repair have left it; for the real question is, what is the limit of the court's capacity for superintendence? The second Illustration to clause (*c*), s. 12, and the Illustration to s. 22, III, show that a court is considered competent to superintend some rather complicated works. But both those examples contain this element, that the plaintiff, having parted with his land, had no opportunity of doing the work which the defendants had contracted to do and so ascertaining the amount of damages sustained by their non-performances, even if damages would anyhow be an adequate compensation. This was the ground on which *Storer* v. *G. W. Ry. Co.* (1 Y. & C. C. C. 48) was decided; and in another case, where plaintiff had sold land to defendants, who covenanted forthwith to make a road and build a market-house thereon, and they entered, made the road, but did not build, the court said that, as they had the benefit of the contract *in specie*, it would go any length that it could to compel them to perform their contract *in specie*. (*Price* v. *Penzance*, 4 Hare 506.) It seems that the Scotch courts will go further than the English in these cases, by appointing some properly qualified person, under whose superintendence the work is directed to be executed (Fry on S. P. 38); and this the Illustration to clause (c), s. 12, assumes that our courts may also do. But there must be a limit to the exercise of this power, or half the works in a country would soon be in the hands of architects and engineers appointed by the courts. Certainly the work to be done should be definite; the plaintiff should not be in a position to do it himself, and damages not be a fair substitute for non-performance. Where all these three concur, the cases show that the courts will go great lengths in superintendence.

Difficulty as to damages.

The difficulty will be upon the third ground. Thus, take the case of a landlord who has covenanted to rebuild or repair a house during a long term: if the tenant sues first, the sum needed as damages must be greatly conjectural, or if he does the work first and then sues for his compensation, it is at his peril to show the exact sum properly expended. Or suppose the landlord is himself a builder by trade, when such

a covenant would be a likely one: is the other party to be driven at his own peril to advance his own money to perform what properly belongs to another, when, from his own want of skill or means, he may at every step meet with difficulties and sacrifices for which he can get no real compensation, and the risk of which the other party has expressly taken upon himself? (1 Story's Eq. 725-8.) Still, I incline to think that in such a case specific performance should not be decreed. In one leading judgment it was laid down that, where the contract to build or rebuild has a definite certainty as to size, materials, &c., it ought to be decreed to be specifically performed; but if it is loose, general or uncertain, it ought to be left as a question of damages (*Moseley* v. *Virgin*, 3 Ves. 185.) This seems a sensible rule, but it cannot be said to be settled law. Certainly, where there is a contract to build a house of a particular value, but no plan has been agreed upon, it is too indefinite. (*Brace* v. *Wehnert*, 27 L. J. Ch. 572.) So, where defendants were to construct a branch railway according to specifications, and plaintiffs (the company for whom the work was to be done) were to procure the land, and the defendants were to give a money-bond to secure due performance, it was held that no part of the contract could be specifically enforced, for the court could not superintend the execution of the works, neither could it compel the plaintiffs to procure the land; and the part as to the money-bond would, therefore, not be enforced. (*S. Wales Ry. Co.* v. *Wythes*, 1 K. & J. 186; see also *Raphael* v. *Thames Valley Ry. Co.*, L. R. 2 Eq. 37, 48, 51, *S. C.* L. R. 2 Ch. 147.) So, where there was a contract to repair a ship, and on failure to do so, the owners might enter the dock and do the work, and then on the insolvency of the contractors the dock was about to be sold, as the court could not specifically perform the whole agreement it refused to interfere, though the result might be that the owners could not enter the dock and do the repairs. (*Merchants' T. Co.* v. *Banner*, L. R. 12 Eq. 18.)

Eleventh Illustration to clause (*b*).

The eleventh Illustration is the case of *Taylor* v. *Portington* (7 M. & G. 328), and though it is used here as an example of a contract involving a kind of work which the court could not execute or superintend, the substantial defect on which the case was decided was the uncertainty of its terms; and as such it is rather an Illustration of clause (*c*). As to a contract to marry, Mr. Mayne (Hindu Law, 3rd Edn. § 88) points out that in Hindu law there is a marked

distinction between betrothal and marriage. "The one is a completed transaction; the other is only a contract." Hindu law permits, on certain grounds, the repudiation of the contract of betrothal; but if there is a breach of contract without just ground, the only remedy is an action for damages, when, of course, at least all expenses resulting from the abortive contract will be recoverable. It may have been otherwise under ancient Hindu law, but it is now settled by decisions in our courts that the contract by betrothal to marry will not be enforced. For this he cites *Umed Kika* v. *Nagindas*, 7 Bom. H. C. (O. C.) 122; *Nowbut* v. *Mussamut L. Koer*, 5 N-W. P. 102; *Re Ganput Narain Singh*, I. L. R. 1 Cal. 74. There may now be in England a contract for separation between husband and wife without the intervention of a trustee. Apparently specific performance of such a contract would be enforced. (*McGregor* v. *McGregor*, 21 Q. B. D. 424.)

(*c*) a contract, the terms of which the court cannot find with reasonable certainty;

A, the owner of a refreshment-room, contracts with B to give him accommodation there for the sale of his goods and to furnish him with the necessary appliances. A refuses to perform his contract. The case is one for compensation and not for specific performance, the amount and nature of the accommodation and appliances being undefined.

The Illustration to this clause is the case of *Paris Chocolate Co.* v. *Crystal Palace Co.* (3 Sm. & G. 119.)

It is often said that a contract to be specifically enforced must be "certain, fair and just in all its parts." The want of fairness or justice will fall to be considered elsewhere; here we have only to do with the want of certainty. As to this, it should be borne in mind that in a suit for damages on breach of a contract, it is enough to prove that the defendant has not performed the contract, a conclusion which may be often arrived at without any exact consideration of the terms of the contract; but in a suit for specific performance it must be shown, not only that the contract has not been performed, but what is the contract which is to be performed. (Fry on S. P. 162.)

Rule as to certainty.

The want of certainty may be either (1) in the agreement not completely indicating some of the essentials of a contract as to subject-matter, parties, prices or terms; or (2), in the description of one or more of these being too vague to be definitely apprehended.

Rule as to price.

In the remarks on the fourth Illustration to clause (*b*) we saw that, in respect to the essential of price, there may be an incompleteness which the court cannot supply, and then there is really no contract; but in the second class of cases there given, though the price may, on the face of the instrument, be uncertain, yet if the mode of ascertaining it is indicated, and is such as the court can make use of, then the apparent uncertainty ceases to be real.

Difficulties often occur in determining what is a reasonable rate, or in assessing particular damages which a man has sustained under particular circumstances. But these are difficulties a court is bound to overcome. (*New Beerbhoom Coal Co.* v. *Bolaram Mahata*, L. R. 7 I. A. 107.)

Rule as to subject-matter.

So in respect to the subject-matter, extrinsic evidence may often be needed to show the identity of the actual thing with the thing described; as where a house is sold described as "A's house." (*Ogilvie* v. *Foljambe*, 3 Mer. 53; *Shardlow* v. *Cotterell*, 20 Ch. D. 90.) So, the identity of the subject-matter may be described by a reference to certain deeds in the possession of A, and then it may be capable of being ascertained. Where there was an agreement for a lease of all the coal mines under a certain small farm, "the boundaries to be hereafter defined," it was held that there was no such uncertainty as to prevent a specific performance. (*Haywood* v. *Cope*, 27 L. J. 468, Ch.; *Chattock* v. *Muller*, 8 Ch D. 177.) Where at an execution-sale an auction-purchaser bought "the judgment-debtor's right to get by division or separation 150 *bighas* of land by measurement," and the auction-purchaser then sued for possession of 150 *bighas* of land, it was held that clause (*c*) did not stand in the way of the enforcement of the specific performance of the contract. (*Rudra Perkash Misser* v. *Krishna Mohun Ghattack*, I. L. R. 14 Cal. 241.) But the description may be too indefinite to show what it was that was bought or sold; or it may be impossible to ascertain: as where any coals or iron-stone under land sold for a railway were to be paid for at so much a ton, and it was not known, and could not be learnt, except by actually mining for them, whether there was any or what quantity of coals or iron-stone. (*Williamson* v. *Wootton*, 3 Drew 210.) In *Lewis* v. *James* (32 Ch. D. 327), where there had been an agreement for the lease of a mine, and both parties desired specific performance, but there was a

dispute as to some of the terms of the lease, and the lessee was in possession of the mine and was removing coal, the court stated the rule as to the terms to be imposed on the lessee, pending the litigation, and the amount of money to be paid into court.

Terms that will be implied.

Then as to other material terms of a contract, their omission may or may not be fatal, or though not omitted, they may be so indefinitely described as to be too uncertain. There are some terms which the law will imply: thus an agreement to sell generally, is to sell an absolute interest; or to renew a lease, is to renew on the old covenants; and a condition for a good title and to deliver up the title-deeds will be implied on a sale. But an agreement for a lease, and no term or ascertainable date for it to begin, is expressed; or for a partnership, and no provision for the proposed capital, is too incomplete for specific performance; for an agreement framed in general terms will be carried out where the law will supply the details; but if any details are to be supplied in modes which cannot be adopted by the court, there is no complete agreement. (*S. Wales Ry. Co.* v. *Wythes*, 5 D. M. & G. 888; *Marshall* v. *Berridge*, 19 Ch. D. 233.) Or the description of the details may be too indefinite, as in the case used as an illustration, for who is to say what appliances are necessary? or in the case used as the eleventh Illustration to clause (*b*), what will satisfy the term that "the drawing-rooms are to be handsomely decorated according to the present style"? Where on the settlement of plaintiff's estate, Government stipulated to retain under its own control the construction of embankments and the excavation of canals within the estate, and afterwards allowed a certain canal to silt up, and the drainage to be impeded, to the injury of plaintiff's lands and crops: *Held*, that no suit based on the stipulation would lie against Government to compel the re-excavation and maintenance of the canal, because the terms of the stipulation were too vague and general and because the course pursued by the Government may have been on the whole the best for carrying out the purpose for which the stipulation was made, namely, the comfort and health of the population. (*Chunder Sikhur Mookerjea* v. *Collector of Midnapore*, 1 C. L. R. 384.) So, where a railway company had agreed with a landowner to erect a station on certain lands which they had bought from him; but the agreement contained no further description of the station nor any stipulations as to the use of it, this was held to be a case in which justice could better be

done by an inquiry as to damages, which would form a more complete as well as more practicable remedy, than by a decree for specific performance. (*Wilson* v. *Northampton & B. J. Ry. Co.*, L. R. 9 Ch. 279.) But it is easier to give instances than to state a precise rule as to what does or does not amount to a fatal uncertainty in the terms.

(*d*) a contract which is in its nature revocable ;

A and B contract to become partners in a certain business, the contract not specifying the duration of the proposed partnership. This contract cannot be specifically performed, for if it were so performed, either A or B might at once dissolve the partnership.

The Illustration is the example ordinarily given of this rule (*Scott* v. *Rayment*, L. R. 7 Eq. 112) ; but it would be applicable also where there is a stipulation making an agreement revocable on the happening of a certain event, and it has happened, so that the other side can at will revoke the contract ; as where there is an agreement to grant a lease or to renew an old lease, with conditions as to its being revocable on certain defaults ; then it would be useless to decree the granting of the lease or renewal if the defendant is already in a position to revoke it the next day. (*Gourlay* v. *Somerset*, 1 V. & B. 68 ; *Gregory* v. *Wilson*, 9 Hare 683.)

(*e*) a contract made by trustees either in excess of their powers or in breach of their trust ;

A is a trustee of land with power to lease it for seven years. He enters into a contract with B to grant a lease of the land for seven years, with a covenant to renew the lease at the expiry of the term. This contract cannot be specifically enforced.

The directors of a company have power to sell the concern with the sanction of a general meeting of the shareholders. They contract to sell it without any such sanction. This contract cannot be specifically enforced.

Two trustees, A and B, empowered to sell trust-property worth a lákh of rupees, contract to sell it to C for Rs. 30,000. The contract is so disadvantageous as to be a breach of trust. C cannot enforce its specific performance.

The promoters of a company for working mines contract that the company, when formed, shall purchase certain mineral property. They take no proper precautions to ascertain the value of such property, and in fact agree to pay an extravagant price therefor. They also stipulate that the vendors shall give them a bonus out of the purchase-money. This contract cannot be specifically enforced.

First Illustration to clause (*e*).

The first Illustration to clause (*e*) is the case of *Harnet* v. *Yielding*. (2 Sch. & L. 549.) It is obvious that the effect of the covenant to renew would be that the renewed lease would be at the old rent, without regard to the increased value of the property in the interval, and anyhow this part of the contract could certainly not be enforced. But how should it be, if (as happened in the above case) B offers to forego the covenant to renew, and to take the first lease for seven years, the two being clearly severable? In the decision it was said that if B had been put into a situation from which he could not extricate himself, A might be called on to make the best title in his power; but that nothing could be more mischievous than to permit a person, who knows that another has only a limited power, to enter into a contract with that other person, which, if executed, would be a fraud on the power, and when that was objected to, to say, "I will take the best you can give me." Nothing is said in our Illustration as to B having notice of the limit of A's powers, nor as to whether B might forego the covenant to renew; but, as it stands, the Illustration follows to its full extent the decision in *Harnet* v. *Yielding*, probably on the whole the most convenient decision, though very high authority has denied that it is sound law. (See Sugden's V. & P. 255.) As to the measure of liability in the case of an appointment by a trustee in fraud of the power under the deed of settlement see *Bridger* v. *Deane* (42 Ch. D. 9). And as to the remedies in the case of an unauthorized investment, *Worman* v. *Worman* (43 Ch. D. 296).

The general rule is clear that there can be no specific performance which would necessitate a breach of trust, or compel a person to do what he was not lawfully competent to do; so, an agreement made by a guardian of a minor to sell land belonging to such minor at a fixed price, but contingent upon the permission of the court, could not be specifically enforced in the absence of such permission. (*Narain Pattro* v. *Akhoy Narain Manna*, I. L. R. 12 Cal. 152.) The difficulty is the limitation of the rule, and whether it extends to independent parts of the contract free from the taint.

Second Illustration to clause (*e*).

It has been held that, if an agent contract to sell property in a manner not authorized by his principal, as by private contract instead of by public auction, the contract will not be enforced, even though more than the reserved price was obtained. (*Daniel* v. *Adams*, Amb.

495.) And this is substantially the same kind of case as that put in the second Illustration, where it would not alter the matter to show that the price obtained by the directors was after all as good as, or better than could be expected.

Third Illustration to clause (*e*).

The third Illustration was probably suggested by the case of *Mortlock* v. *Buller* (10 Ves. 292), where the trustees allowed the tenant-for-life as their agent to conclude an agreement to sell; but there was such gross negligence in inquiring into the true value of the property, and such inadequacy of price, that the sale, if carried out, would have been deemed, as against others interested in the trust, a breach of trust on the part of the trustees. Under this head would seem to come such cases as *Dunn* v. *Flood* (28 Ch. D. 586) and *Dance* v. *Goldingham* (L. R. 8. Ch. 902). Where trustees sell with depreciatory conditions, the purchaser may resist specific performance. The principle is that such sale is necessarily a breach of trust and the court will never decree a specific performance which would be such; though the objection by the purchaser is one rather in the interests of the beneficiaries and which concerns them, and not the purchaser. Trustees are liable for improvident investments even after transfer of the trusts. (*Smethurst* v. *Hastings*, 30 Ch. D. 490.)

Fourth Illustration to clause (*e*).

The fourth Illustration is an example of a sadly numerous class of cases, of which *Fawcett* v. *Whitehouse* (1 R. & M. 132), and *Hichens* v. *Congreve* (1 R. & M. 150) are early instances, and *Emma Silver Mining Co.* v. *Grant* (11 Ch. D. 918) is a more recent, and, perhaps, the most gigantic and disgraceful specimen. As was said in one case, "a promoter is in a fiduciary relation to the company which he promotes or causes to come into existence. If that promoter has a property which he desires to sell to the company, it is quite open to him to do so; but upon him, as upon any other person in a fiduciary position, it is incumbent to make a full and fair disclosure of his interest and position with respect to that property. There is no difference in this respect between a promoter and a trustee, steward or agent." (*N. Sombrero P. Co.* v. *Erlanger*, 5 Ch. D. 118.) In this case some of the directors were mere nominees of the promoters, and others were carefully kept in ignorance of the facts as to the property. From the fiduciary relation of promoters to the company they are forming, it is their duty, if the property they seek to sell to the company is their's, to

provide it with directors who may exercise an independent judgment on the subject. (S. C. 3. Ap. Cas. 1218, 1236.) In another case, where the owners of a concession, knowing that by their own default it had become voidable, promoted a company, to the trustees of which they sold it, the trustees taking a sum of money from them, and omitting to inquire into the title, and the solicitors to the vendors were also solicitors to the company, and fraudulently concealed the defect of title, the whole of the purchase-money was ordered to be repaid by the promoters, and the sum received by the trustees to be repaid by them and all, including the solicitors, were ordered to pay the costs. (*Phosphate Sewage Co.* v. *Hartment*, 5 Ch. D. 394; *Bagnall* v. *Carlton*, 6 Ch D. 371; compare the two analogous cases of *S. of Practical Knowledge* v. *Abbott*, 2 Beav. 559, and *In re British S. P. B. Co.*, 17 Ch. D. 467 the *ratio decidendi* in the latter was somewhat technical.)

It would serve no purpose to multiply cases; their details vary somewhat, but the character of the fraud is the same in all, and the principle of the trust relation of promoters or directors to their companies solves them all. As between third persons and the company, contracts so made cannot be enforced against the company; and as between the company and its directors or promoters, the former may compel the latter to disgorge all illicit gain made in fraud of their duty as trustees.

(*f*) a contract made by or on behalf of a corporation or public company created for special purposes, or by the promoters of such company, which is in excess of its powers;

A company existing for the sole purpose of making and working a railway, contracts for the purchase of a piece of land for the purpose of erecting a cotton-mill thereon. This contract cannot be specifically enforced.

Contracts *ultra vires*.

The contracts within this clause are a very numerous class, known as *ultra vires* cases. Clause (*e*) also includes some contracts *ultra vires* by trustees, and the second and fourth Illustrations show that directors or promoters of a company are trustees, and as such may make contracts *ultra vires*; but they are trustees only in relation to the shareholders, and it is, therefore, only where this trust relation has been violated by their contract with a third party being either in excess or in breach of their trust, that the case falls within clause (*e*). If the contract is to be regarded as made

by or on behalf of the corporation or company,—as, for instance, where it has been authorized or ratified by the shareholders as a body,—then the case is within clause (*f*); for the trust relation is then not involved at all in the discussion, and the sole question is between the company and the third party, as to whether the contract is *ultra vires*.

In England corporations and companies are so numerous, that separate treatises are devoted to these *ultra vires* cases; but in India for some time to come they will be rare, and a summary of leading principles will here suffice.

A contract by a corporation or company in the proper form is *primâ facie* good, and the *onus* is on the party alleging it to be void, to show that it is in excess of its powers. That the contract is *ultra vires* may be shown by the express provisions of the law creating the company, or by necessary or reasonable inference therefrom. The more difficult and frequent cases are contracts prohibited by implication. Contracts that go to defeat the objects of the incorporation are clearly so prohibited. So also are contracts for objects foreign to the purposes of the incorporation, as, for example, to carry on a distinctly different trade. That such foreign object is profitable or not, or opposed by the shareholders or not, is immaterial; the funds of the company can go only to the purposes for which it exists. The Illustration to clause (*f*) is a good example of such a foreign object. Generally, the cases lie much nearer the line as where a railway company has, without authority, sought to establish a steamer service in order to feed its railway traffic. In cases of this kind also there must be borne in mind the distinction between a purpose not authorized by the incorporation, which is never allowable; and unauthorized means of effectuating the authorized purpose, which may be allowable. Thus, a company embodied to make a railway from A to B, may not make one from C to D instead, but it might lawfully contract to effect a deviation in part of its course between A and B from that originally specified. Again, a contract though *ultra vires* as between the directors and the shareholders, is not necessarily so as against the other party to the contract. If from its nature it is obviously unconnected with the purpose of the company, it is void; but not if apparently connected therewith, though in truth not so intended, provided the third party acts *bonâ fide*, without knowledge of the real intention: as where a railway company contracts for rails or for land apparently but not truly intended for its proper purposes,

the other party who acts *bonâ fide* may enforce the contract. *Eastern Counties Ry. Co.* v. *Hawkes*, 5 H. L. C. 331; Fry on S. P. 2nd ed. 214; *Shamnagger Jute Co.* v. *Ram Narain Chatterjee*, I. L. R. 14 Cal. 189.)

Corporation and company distinguished.

The clause speaks of both corporations and companies; and there is this important difference between them, that whilst it is competent for *all* the shareholders of an unincorporated company to depart from the agreement entered into by each with the others, it is not competent for the shareholders of a company incorporated by charter or statute to do anything contrary thereto. Where by law the deed of association of a company has to be registered, and so is accessible to the public, the better opinion seems to be that a person dealing with the directors is bound to know the limits of their authority. But as to acts *intra vires* but irregular (as distinguished from acts purely *ultra vires*), the rule seems to be that a person is not bound to see that acts of directors within their powers are done precisely in the mode prescribed, but if dealing *bonâ fide*, and without notice of the irregularity, he is not affected thereby; for he has then a right to presume that all things have been rightly done, as that the needed resolutions have been passed, the meetings duly summoned, and the like. (See Lindley on Part, B. ii, ch. 1, s. 2.)

Contracts by promoters.

As to contracts made by the promoters of a company, it is obvious that as the company does not exist when the contract is made, it cannot at the time be bound by it, and a company cannot *ratify* such a contract so as to make it binding upon itself as from a time prior to its own existence. (*Imperial Ice M. Co.* v. *Munchershaw*, I. L. R. 13 Bom. 415.) But ordinarily the act or instrument establishing the company expressly provides for such contracts, or the company may, acting within its powers, have adopted and taken the benefit of the contract, and then, if such as would have bound it if made after its formation, it may be concluded by its conduct. But the mere existence of a lawful contract which has not been adopted, is not sufficient: as where the contract is to pay for land at a certain price, and the land is not taken by the company under its powers. Much more if the contract of the promoters is one which would be *ultra vires* if entered into by the company after its formation, it cannot, even if ratified by the company, be enforced against it. (Lindley, B. ii, ch. 2, s. 2; *Shrewsbury* v. *N. S. Ry. Co.*, L. R. 1 Eq. 593.)

(*g*) a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date;

A contracts to let for twenty-one years to B the right to use such part of a certain railway made by A as was upon B's land, and that B should have a right of running carriages over the whole line on certain terms, and might require A to supply the necessary engine-power, and that A should during the term keep the whole railway in good repair. Specific performance of this contract must be refused to B.

Scope of the clause.

The peculiarity in this clause is the limitation of three years: the period is, of course, an arbitrary one; an English court of equity where continuous duties, which it cannot enforce, are involved, simply refuses specific performance, and the clause is so far a qualification of the rule. But two things must be borne in mind in respect to this period of three years: (1) the continuous duty must still be of such a nature as not to fall within clause (*b*); otherwise, though the contract be only for three years or less, specific performance will be refused. This is apparent from the examples given in the sixth and seventh Illustrations to clause (*b*). (2) Though the continuous duty is of such a nature that it might be enforced, provided the contract were not for more than three years, yet, if it be for more than three years, it cannot be enforced up to the period of three years; for the contract cannot be split into two periods, and enforced as to one and not as to the remainder. A case enforceable within the period limited by this clause will, I apprehend, be of very rare occurrence.

The Illustration to clause (*g*).

The Illustration to the clause is taken from the case of *Blackett* v. *Bates* (L. R. 1 Ch. 117), where specific performance, though granted by Wood, V.C., was, on appeal, refused. The suit was really to enforce the award of an arbitrator, and the position of the parties was exactly reversed, as A then sued B, instead of as in the Illustration, B suing A. Cranworth, L. C., said: "The rights of the parties in respect of specific performance are the same as if the award had been simply an agreement between them. Had it been an agreement, would there have been a case for a specific performance? I think not, and for this short and simple reason,—that the court does not grant specific performance unless it can give full relief to both parties. Here the plaintiff [A in the Illustration] gets at once what he seeks—

the lease [that is, of that part of B's land on which A had made his railway]; but the defendant [B in the Illustration] cannot get what he is entitled to, for his right is not a right to something which can be performed at once, but the right to enforce the performance by the plaintiff (A) of daily duties during the whole term of the lease. The court has no means of enforcing the performance of these duties; all it can do is to punish the plaintiff (A) if he does not perform them." And again, "In order that the court may interfere, there must be mutual rights capable of being enforced by the court. Now here, if the defendant (B) had been willing to perform the award, and the plaintiff (A) unwilling [the case put in our Illustration], could the defendant (B) have filed a bill for specific performance of the agreement to keep the road in repair, or to supply engine-power? It is clear that such a bill could not be maintained. This disposes of the case, there being no mutuality. If the arbitrator instead of awarding that the plaintiff (A) should do certain acts, had awarded that the lease to be executed should contain covenants by the plaintiff (A) to do them, the case would have stood on an entirely different footing. The court would not then have been called upon to enforce, either directly or indirectly, the doing of those acts, but merely to decree the execution of a lease containing certain covenants [when for each breach there would be a remedy by damages], a kind of relief which is clearly within the jurisdiction of the court, and open to no objection." I have given these extracts, because the reversed position of the parties in the Illustration makes the case all the more instructive.

(*h*) a contract of which a material part of the subject-matter, supposed by both parties to exist, has, before it has been made, ceased to exist.

A contracts to pay an annuity to B for the lives of C and D. It turns out that, at the date of the contract, C, though supposed by A and B to be alive, was dead. The contract cannot be specifically performed.

As bearing upon this clause must be remembered the general rule in s. 20, Indian Contract Act, that "where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void." Here the mutual mistake of fact is limited to the subject-matter, and in respect to it, to the fact of the existence, at the date of the contract, of a part (as distinguished from the whole) of such subject-matter. The object is supposed to be single,

and part of it, though it once existed, has ceased to exist. The case is thus distinct from where the mistake is as to what or how much is comprised by the particular and specified object of the contract. The practical difficulty will always be whether the part that had at the time ceased to exist was a material ingredient in the subject-matter. A case within this clause thus differs from one within ss. 14, 15 and 16, where the mistake (if any) is unilateral, and more or less connected with default by one party, and also from a case within s. 26, where the mistake is also unilateral and not mutual, and relates to the subjective and not the objective aspect of the contract.

Very analogous to the Illustration is the case of *Cochrane* v. *Willis* (L. R. 1 Ch. 58), where a tenant-in-tail, expectant on the death of a tenant-for-life who was insolvent, being desirous of preserving the timber on the estate from being cut, signed an agreement with the agent of the assignee of the tenant-for-life, agreeing that the assignee should have the same right to the timber as if he had actually cut it on a past day named, which was prior to the death of the tenant-for-life; and the assignee agreed to refrain from cutting it for a month. It turned out that the tenant-for-life (who was in India) was dead at the date of the agreement, although both the tenant-in-tail and the agent of the assignee were ignorant of the fact; and it was held, on the suit of the assignee to enforce the agreement, that the continuing life of the tenant-for-life at the date of the agreement, being a material part of its subject-matter, there could be no specific performance.

And save as provided by the Code of Civil Procedure, no contract to refer a controversy to arbitration shall be specifically enforced; but if any person who has made such a contract, and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

The last paragraph on the subject of arbitration is substantially in accord with the English rule. (17 & 18 Vict. c. 125, s. 11.) On this Story says, "Where the stipulation is an effort to divest the ordinary jurisdiction of the common tribunals of justice (such as an agreement in case of any disputes to refer the same to arbitrators), courts of equity will not, any more than courts of law, interfere to enforce that

agreement; but they will leave the parties to their own good pleasure in regard to such agreements. The regular administration of justice might be greatly impeded or interfered with by such stipulations if they were specifically enforced. And, at all events, courts of justice are presumed to be better capable of administering and enforcing the real rights of the parties than any mere private arbitrators, as well from their superior knowledge as their superior means of sifting the controversy to the very bottom." (1 Story's Eq. 670; see also *Scott* v. *Corporation of Liverpool*, 3 De G. & J. 334; 27 L. J. 230 Ch.) The contract, the existence of which would bar a suit under the circumstances contemplated by this section, must be an operative contract, and not one broken up by the conduct of all the parties to it. Where the parties were contentious among themselves with reference to the arbitration proceeding, and where some of the arbitrators had died and no award had been made, it was held that the contract to refer was no bar. (*Tahal* v. *Bisheshar*, I. L. R. 8 All. 57.) The Civil Procedure Code, ss. 523, 4, provides for the carrying out of certain agreements to refer disputes to arbitration, and ss. 525, 6 for the execution of an award already made under any agreement to refer to arbitration; but in each case this is done by moulding the matter into the form of a suit between the parties, and then dealing with it under the rules for arbitrations or awards in the course of ordinary suits. Further, it should be remembered that, on the one hand, where it is agreed that such a matter as the price to be paid for a certain property, or the sum to be paid by one party to the other on a certain event, shall be fixed by the award of a third person, there can be no cause of action until such award is made; and, on the other hand, when an award has actually been made as agreed upon, it is itself the same as a contract between the parties, and is equally capable of being specifically enforced, and must, therefore, bar any other suit for the same subject-matter. (*Hart* v. *Hart*, 18 Ch. D. 689; 2 Story's Eq. 1457*a*, 1458; see on enforcing awards, *infra*, s. 30.) But there must be a subsisting agreement to refer to arbitration. If the submission to arbitration is revoked, there will be no bar to a suit in respect of the differences which it had antecedently been agreed to refer to the arbitration of particular persons. (*Deutche S. A. G.* v. *Briscoe*, 20 Q. B. D., 177.) In *Viney* v. *Bignold* (20 Q. B. D. 172), which was an action on a policy of fire insurance, one of the terms of the policy was that the amount of any loss should be ascertained by an arbitrator, it was held that the reference

was a condition precedent to an action on the policy. In some cases the court will refuse to stay proceedings in an action pending arbitration and where there is an existing agreement to refer to arbitration. (*Davis* v. *Starr*, 41 Ch. D. 242.) As to when a court will grant an injunction staying arbitration proceedings, see *Farrar* v. *Cooper* (44 Ch. D. 323).

The rule laid down in this last paragraph is a sound practical one, for it prevents the indiscriminate ousting of the ordinary administration of justice by means of private agreements, and yet it bars one party from inequitably disavowing his own contract. Thus, one partner can no more revoke a general agreement to refer to arbitration disputes as to partnership matters than he could revoke any other contract in the partnership articles. But the question whether any particular matter in dispute is within the agreement to refer is one which the court will decide, and will not leave to the arbitrator. (*Piercy* v. *Young*, 14 Ch. D. 200.) So, where in a trade partnership in Russia there was a covenant to refer disputes to a particular court there, this was held to be in substance an agreement to refer to arbitration there, and proceedings in England were suspended pending such reference. (*Law* v. *Garrett*, 8 Ch. D. 26.)

Before s. 21 of the Specific Relief Act can be relied on as a bar to a suit upon a contract containing a stipulation that matters in dispute arising out of the contract shall be referred to arbitration, it must be shown that the plaintiff has refused to refer to arbitration. The filing of a suit is no such refusal. (*Koomal Chunder Das* v. *Chunder Kant Mookerjee*, 5 C. L. R. 284.)

The Allahabad Court also held that the mere filing of a suit on the part of a plaintiff was not tantamount to a refusal to refer to arbitration. (*Tahal* v. *Bisheshar*, I. L. R. 8. All. 57.) In that case it was admitted that the parties had agreed to an arbitration. The plaintiffs sued for part of the subject-matter referred to the arbitrators more than a year after that date. The defendants pleaded the bar of s. 21 but did not allege in answer to the plaint that the plaintiff refused to perform his contract to submit to arbitration. And one of the arbitrators swore that the arbitrators did not decide the case because the parties were "contentious." The court held that the contract, the existence of which would bar a suit under the circumstances contemplated by this section, must be an operative contract, and not a contract broken up by the conduct of the parties to it.

If the agreement to refer did not indicate what was the subject-matter to be referred, or if the plaintiff's claim had not been laid before the arbitrators, such an agreement would not bar the plaintiff's suit, nor, if the plaintiff had withdrawn from the arbitration and there was no evidence to show the time at which she had withdrawn therefrom, whether before or after the time allowed to the arbitrators to make and publish their award. If the latter, her withdrawal would not be a refusal on her part to perform her agreement to refer. Even if the plaintiff had refused to perform her agreement to refer, if there were nothing to show that the defendant had not acquiesced in it, the existence of the agreement would not bar the plantiff's suit. (*Adhibai* v. *Cursandas Nathu*, I. L. R. 11 Bom. 199.)

If a suit pending in court is referred before it comes on for trial, this section would bar a fresh suit on the same subject-matter. (*Sheoambar* v. *Deodat*, I. L. R. 9 All. 168.)

It was with reference to this paragraph that s. 28 Indian Contract Act, was in part repealed; the object being, whilst applying in the last sentence a kind of moral pressure to prevent people who have entered into contracts to refer to arbitration from breaking them wilfully and capriciously, yet to leave the other and innocent party entirely free to seek the remedy from which he had been apparently shut out by the provisions of the Contract Act.

(*c*) *Of the Discretion of the Court.*

22. The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary, but sound and reasonable, guided by judicial principles, and capable of correction by a court of appeal.

Discretion as to decreeing specific performance.

The discretion of a court is always judicial, and not capricious; and the general principle here briefly stated is not peculiar to cases of specific performance. The following remarks of Story are valuable. He says: "In truth, the exercise of this whole branch of equity jurisprudence, respecting the rescission and specific performance of contracts, is not a matter of right in either party, but it is a matter

Story's remarks on judicial discretion.

of discretion in the court; not, indeed, of arbitrary and capricious discretion, dependent upon the mere pleasure of the Judge, but of that sound and reasonable discretion which governs itself as far as it may by general rules and principles; but at the same time which withholds or grants relief, according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties. On this account it is not possible to lay down any rules and principles which are of absolute obligation and authority in all cases; and, therefore, it would be a waste of time to attempt to limit the principles, or the exceptions, which the complicated transactions of the parties, and the everchanging habits of society may, at different times, and under different circumstances, require the court to recognize and consider." (1 Story's Eq. 742.)

As it was well put in one old case: "Although proceedings in equity are said to be *secundum discretionem boni viri*, yet when it is asked, *Vir bonus est quis?* the answer is, *qui consulta patrum, qui leges juraque servat;* so that judicial or equitable discretion does in no case contradict or overturn the grounds and principles of the law." (*Burgess* v. *Wheate*, 1 Wm. Bl. 123.) Where a person seeking specific performance of a contract has slept upon his rights and has delayed in bringing his suit, the objection that his *laches* disentitle him to the consideration of the court is an important one and should be considered by the courts in the exercise of their judicial discretion under this section. (*Mokund Lall* v. *Chotay Lall*, I. L. R. 10 Cal. 1061.) See also Fry S. P., § 1102, 1108, 3rd Edition. On the discretion of a court see the notes under sec. 42, *post*.

Division of the subject.

Of the threefold division of the cases under this section, the I and II divisions contain cases in which the court will properly decline to exercise its jurisdiction; under the former, because to do so would result in an unfair or inequitable gain to the plaintiff; and under the latter in an unfair loss to the defendant. All the Illustrations given must be taken to be cases in which it would be lawful under one or other of the foregoing sections to grant the relief, but in which, from special circumstances, it is not expedient to do so.

For an instance where the court, finding that the parties were not really on equal terms, dismissed the suit and exercised its discretion in refusing an injunction to restrain the defendant from carrying on a particular trade, see *Callianji Harjwan* v. *Narsi Tricum* (I. L. R.

18 Bom. 702.) Where at the time of making an agreement both parties have equal means of knowledge, the fact that their relative legal positions are subsequently discovered to be different to that supposed at the time does not affect the question. (*Shib Lal* v. *The Collector of Bareilly* I. L. R. 16 All. 423.)

The following are cases in which the court may properly exercise a discretion not to decree specific performance :—

I. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant though there may be no fraud or misrepresentation on the plaintiff's part.

Illustrations.

(*a*) A, a tenant-for-life of certain property, assigns his interest therein to B. C contracts to buy, and B contracts to sell, that interest. Before the contract is completed, A receives a mortal injury, from the effects of which he dies the day after the contract is executed. If B and C were equally ignorant or equally aware of the fact, B is entitled to specific performance of the contract. If B knew the fact, and C did not, specific performance of the contract should be refused to B.

(*b*) A contracts to sell to B the interest of C in certain stock-in-trade. It is stipulated that the sale shall stand good, even though it should turn out that C's interest is worth nothing. In fact the value of C's interest depends on the result of certain partnership-accounts, on which he is heavily in debt to his partners. This indebtedness is known to A, but not to B. Specific performance of the contract should be refused to A.

(*c*) A contracts to sell, and B contracts to buy, certain land. To protect the land from floods, it is necessary for its owner to maintain an expensive embankment. B does not know of this circumstance, and A conceals it from him. Specific performance of the contract should be refused to A.

(*d*) A's property is put up to auction. B requests C, A's attorney, to bid for him. C does this inadvertently and in good faith. The persons present seeing the vendor's attorney bidding, think that he is a mere puffer, and cease to compete. The lot is knocked down to B at a low price. Specific performance of the contract should be refused to B.

Illustration (*a*) to s. 22, I.

Illustration (*a*).—Here, if B and C were equally aware of the injury to A, they simply speculated on his chance of life, and each had the same opportunity for judging about it. If both were ignorant of the injury they were also dealing on equal terms; and

as A did not die till the day after the contract was completed, the case would be the same in substance as that put in Illustration (*b*) to s. 13. But if B knew and C did not know the fact, then since A survived the completion of the contract, in strict law C got what he bargained for, namely, A's life interest, and B was merely silent as to what he was not bound to mention; but still "in equity and good conscience," B was taking an unfair advantage. (2 Kent's Com. 490.) The Illustration was probably suggested by the facts of *Ellard* v. *Llandaff* (1 B. & B. 241), where a lessee obtained the renewal of a lease on the surrender of an old one, knowing and suppressing the fact, not known to the lessor, that the person on whose life the old lease depended was in a dying state; and specific performance was therefore refused. So, though there is a known element of uncertainty in the subject-matter, which is only approximately described in the agreement, yet a great divergence from the estimate will bar specific performance. (*Davis* v. *Shepherd*, L. R. 1 Ch. 410.)

Illustration (*b*) to s. 22, I.

Illustration (*b*).—This was probably taken from the case of *Smith* v. *Harrison* (26 L. J. Ch. 412), but in it the court did not merely refuse specific performance at the suit of the vendor, but set aside the sale at the suit of the purchaser, with costs against the vendor. Persons may deal with each other knowing that a contingent or uncertain event may hereafter materially affect the value of the subject-matter one way or the other, and if both are acting with equal knowledge or means of knowledge of the facts, the contract is fair enough and will be enforced, though it results in a great gain to one party or loss to the other. But this is not so where the assumed uncertainty is unreal, and one party knows that to be certain which is treated as uncertain. Here, if the value of C's interest had been, as assumed, a matter of uncertainty to both A and B, the contract would have been enforced, whichever way it turned out; but in truth here B was buying what, it was deemed, might or might not be worth something, while A was selling what he knew was worth nothing.

Illustration (*c*) to s. 22, I.

Illustration (*c*).—This is the case of *Shirley* v. *Stratton* (1 Bro. C. C. 140). It is not said in the Illustration whether A actively or merely passively conceals the fact of the embankment, but I assume that it is the former, as otherwise it is a very patent defect and liability. In the case the vendor "industriously concealed" the

defect; and it is clear that if a vendor industriously prevent a purchaser from seeing a defect, which might easily otherwise be detected, he can neither have specific performance nor recover damages against the purchaser. It must be admitted that this and the preceding Illustrations come very near to cases of fraud or misrepresentation, though that is an ingredient expressly excluded by this section, and left to be dealt with under ss. 26 and 28; this section being limited to such inequality or unfairness, short of fraud, as may disentitle to specific performance, but may (and generally will) leave a right to damages for non-performance. It often happens that a sale is expressly made "with all faults," and on this condition, and on cases that lie near the shadowy line between mere unfairness and fraud, the following remarks of very high authority are valuable: "The condition excuses the seller from stating the faults within his knowledge, but he must not use any artifice to conceal them from the purchaser. Where the seller knew of the defect, and did not disclose it, although he also knew that the purchaser could not by any attention whatever possibly discover it, there is much more difficulty. In such a case no artifice need be resorted to by the seller to conceal the defect from the purchaser, and yet the man who sells such a subject with all its faults without disclosing the concealed one, seems only, in a moral view, on a level with him who, making a similar sale of a subject where a defect might by diligence be discovered, resorts to artifice to prevent the purchaser from coming to the knowledge of it. The question is not of more or less of turpitude, but whether in either case a fraud has not been committed. The rule is not that the seller may use his skill to conceal, and that the purchaser is to use his to discover the defects. The distinction, therefore, is but a thin one between a man who has plastered over a rent in the main wall and papered it over, and then sells, subject to all faults, knowing that the purchaser cannot discover this fatal one, which he does not point out, and a man who, knowing that the defect is thus concealed, sells the estate with all its faults without disclosing this which he knows cannot be discovered: in either case the purchaser is deceived. In the first case, no doubt, the seller by his act hides the defect, but there is no positive fraud in hiding the defect; the fraud is committed, or at least consummated, when the seller by his silence induces the purchaser to buy without the means of knowledge. Now

Remarks on the first three Illustrations.

Unfairness and fraud, how far they differ.

in this respect the sellers in the two cases are upon a par, for each is aware that the defect is hid, and each is silent. Can it, in point of honesty, matter that the one covered the defect, and that the other only knew that it had been covered?" (Sugden's V. & P. 278.) Probably, while the first class of cases will come under the general rule as to fraud vitiating a contract, it is the object of these Illustrations to show that in the second class specific performance at least ought to be refused, leaving the seller to take such damages for non-performance, as, in the circumstances of each case, he may be fairly entitled to. It would be foreign to our subject to speak further of the former cases, and the Illustrations are sufficient examples of the latter; the danger to be here avoided is not to trespass upon the maxim "*caveat emptor*," without which commerce cannot exist. The fairness of the contract, like all its other qualities, and its hardship, must be judged of at the time when it is entered into. (Fry S. P., 3rd Edition, pp. 380, 194. *Shib Lal* v. *The Collector of Bareilly* (I. L. R. 16 All. 423.)

Illustration (*d*).—This is the old case of *Twining* v. *Morrice* (2 Bro. C. C. 326), and is notable, because it is an excellent example both of the elastic term "surprise," and of the unsettled rule as to "puffing at auctions." Surprise is a word used also in s. 26 and s. 28 of this Act; it is not defined in the Indian Contract Act, and is usually said not to be a technical term. Its ordinary sense, that of being taken unawares, so that a person acts without due deliberation or under a confused and sudden impression, is wide enough to cover every rash and indiscreet act into which a man is hastily led. But in law this does not suffice; a man may have been impulsive and hasty in making a contract, and yet be rightly bound by it. As an excuse or defence, the surprise should have been induced by some faulty conduct of the other party, not indeed amounting (as has been said in some cases) to actual fraud, but still, though innocent, so improper that it would be unfair for him to take advantage of the result of it. (1 Story's Eq. 120 (note), 251.) The doctrine in truth rests on those dictates of "equity and good conscience" which are so valuable an ingredient in "judicial discretion," but, misused, lead only to wild uncertainty in law.

Illustration (*d*) to s. 22, I.

Surprise described.

In the Illustration it was wrong for B to employ C to bid for him: other intending buyers would naturally mistake him for A's puffer, and so hold back from

Puffers at auctions.

bidding. The conduct of B and C, though innocent, was faulty, and made it unfair that B should retain the advantage he got from it. The bidding by a puffer unknown to the vendor will not constitute a defence to specific performance (*Union Bank* v. *Munster*, 37 Ch. D. 51). In *Mortimer* v. *Bell* (L. R. 1 Ch. 10), the auctioneer and a puffer, quite innocently, but very improperly, bid against each other, and ran up the price till at last defendant made a real bid, and the property was knocked down to him; but the suit of the seller for specific performance was in consequence dismissed. Clearly, where an auction is expressly "without reserve," puffing of any kind would be a fraud; but this last case seems to leave it uncertain whether the fact of a reserve must be notified or not; or whether the rule in equity, that one puffer may be employed, or that at law, that none may be, is the sounder of the two. Perhaps the law would be simpler and accord with practice, if every auction were taken as subject to reserve; but s. 123, Indian Contract Act, forbids pretended biddings at sales by auction.

II. Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

Illustrations.

(*e*) A is entitled to some land under his father's will, on condition that, if he sells it within twenty-five years, half the purchase-money shall go to B. A, forgetting the condition, contracts, before the expiration of the twenty-five years, to sell the land to C. Here the enforcement of the contract would operate so harshly on A, that the court will not compel its specific performance in favour of C.

(*f*) A and B, trustees, join their beneficiary, C, in a contract to sell the trust estate to D, and personally agree to exonerate the estate from heavy incumbrances, to which it is subject. The purchase-money is not nearly enough to discharge those incumbrances, though at the date of the contract, the vendors believed it to be sufficient. Specific performance of the contract should be refused to D.

(*g*) A, the owner of an estate, contracts to sell it to B, and stipulates that he, A, shall not be obliged to define its boundary. The estate really comprises a valuable property not known to either to be part of it. Specific performance of the contract should be refused to B, unless he waives his claim to the unknown property.

(*h*) A contracts with B to sell him certain land, and to make a road to it from a certain railway station. It is found afterwards that A cannot

make the road without exposing himself to litigation. Specific performance of the part of the contract relating to the road should be refused to B, even though it may be held that he is entitled to specific performance of the rest, with compensation for loss of the road.

(*i*) A, a lessee of mines, contracts with B, his lessor, that at any time during the continuance of the lease B may give notice of his desire to take the machinery and plant used in and about the mines, and that he shall have the articles specified in his notice delivered to him at a valuation on the expiry of the lease. Such a contract might be most injurious to the lessee's business, and specific performance of it should be refused to B.

(*j*) A contracts to buy certain land from B. The contract is silent as to access to the land. No right of way to it can be shown to exist. Specific performance of it should be refused to B.

(*k*) A contracts with B to buy from B's manufactory, and not elsewhere, all the goods of a certain class used by A in his trade. The court cannot compel B to supply the goods, but if he does not supply them, A may be ruined, unless he is allowed to buy them elsewhere. Specific performance of the contract should be refused to B.

We come now to the cases of unfair loss to the defendant, but this is subject to the proviso that the plaintiff may otherwise be placed *in statu quo*, that is, that the defendant, who is seeking equity, is in a position to do equity. Again, there is the absence of any fraud by the plaintiff, and even of any faulty conduct on his part inducing to the defendant's position. The defendant is the victim of unforeseen circumstances, but as the plaintiff did nothing to induce the dilemma, he cannot get quit of his own improvidence, unless he can save harmless the plaintiff.

Illustration (*e*) is an old case decided by Lord Hardwicke, and which is cited in *Ramsden* v. *Hylton* (2 Ves. 307), and Illustration (*f*) is the case of *Wedgewood* v. *Adams* (6 Beav. 600, and 8 Beav. 103), in which Lord Langdale, M. R., cited the previous case, and as to what is "reasonable discretion," said: "What is more or less reasonable is not a thing that you can define; it must depend upon the circumstances of each particular case; the court, therefore, must always have regard to the circumstances of each case, and see whether it is reasonable that it should, by its extraordinary jurisdiction, interfere and order a specific performance, knowing at the time if it abstains from so doing, a measure of damages may be found and awarded in another court. Though you cannot define what may be considered unreasonable by way of general rule, you may very well, in a particular case, come to a balance of inconvenience, and determine the propriety of leaving the plaintiff to his legal remedy by recovery of damages." This case

was followed in *In Re G. N. Ry. Co. and Sanderson* (25 Ch. D. 788) where the vendors were required to pay off a perpetual rent-charge on the land which would have exceeded the whole purchase-money, and they offered to indemnify instead. Specific performance against them was refused and they were allowed to rescind, as the result would be to inflict a great and unexpected hardship on them.

Illustration (*g*).—This is the case of *Baxendale* v. *Seale* (19 Beav. 601.) It was really a case of mutual mistake of fact as to the subject-matter, for neither party knew or supposed that the property in question formed part of the estate. Had it been intended to be the sale of a subject-matter of a known contingent and doubtful extent, as to which each was to take his chance, and, therefore, the boundaries were left undefined, the case would have been different; but, in truth, if B gets the specific performance offered him, he will get all he intended or supposed that he was buying.

Illustration (*g*) to s. 22, II.

Illustration (*h*) is the case of *Peacock* v. *Penson* (11 Beav. 355), and illustrates the rule that equity will not compel a person specifically to perform an act which would render him liable to a forfeiture, or which he is not lawfully authorized to do, so that he would be exposed to a new action of damages at the suit of the person injured by such act. As, in the case here put, B might clearly be entitled to performance of such part as A can perform, with compensation for the part not in his power, it is not distinguishable from a case under s. 14; and this Illustration is peculiar, as the objection of hardship (if, indeed, it is not rather a case of inability than of hardship) does not go to the entire performance, as in all the other cases, but to a part only, and that not necessarily material. A mere technical objection to the title, involving no hardship, will, however, be disregarded. (*Marlborough* v. *Sartoris*, 32 Ch. D. 616.)

Illustration (*h*) to s. 22, II.

Illustration (*i*) is the case of *Talbot* v. *Ford* (13 Sim. 173), where the covenant was held to be so injurious and oppressive to the lessee, that not only was specific performance refused, but also an injunction to prevent a breach of the covenant. It was said in the judgment that it was not unusual in mining leases that there should be a stipulation that the lessor should be able, shortly before the expiry of the lease, to give notice to take the plant at a valuation; but

Illustration (*i*) to s. 22, II.

here the notice might be given at any time after the lease had begun, and would have the effect of preventing the lessee from afterwards moving or altering any of the machinery; and so it was thought to be so injurious and oppressive that the court ought not to interfere for the purpose of giving effect to it. The case seems a strong one.

Illustration (*j*) to s. 22, II.

Illustration (*j*) is the case of *Denne* v. *Light* (26 L. J. Ch. 459; see the amusing judgment of Knight-Bruce, L.J.); and here the hardship was that specific performance would have been to make a man buy what he could not enjoy. The case was about a small patch of land surrounded by common.

Illustration (*k*) to s. 22, II.

Illustration (*k*) contains, besides the hardship to A, the element so important in English equity, of want of mutuality of remedy. B's contract falls within s. 21, cl. (*b*), and is the same as the tenth Illustration, and could not be enforced against him; otherwise it might very well be that there would be no hardship in enforcing A's contract against him. The Illustration and the reasons given in it were suggested by the decision in *Hills* v. *Croll* (2 Phill. 60).

Doctrine of hardship, its limits.

This doctrine of hardship must be applied with caution: it has been well said that "a court of equity does not affect to weigh the actual value, nor to insist upon an equivalent in contracts, where each party has equal competence. When undue advantage is taken, it will not enforce the contract; but it cannot listen to one party saying that another man would have given him more money or better terms than he agreed to take. It may be an improvident contract, but improvidence or inadequacy do not determine a court of equity against decree in specific performance." (Sugden's V. & P. 177, *Lawrie* v. *Lees*, 7 Ap. Cas. 31, 36.) The bargain must be so hard as to be unconscionable, so that its actual performance would, in the circumstances, be inequitable; and further as the contract is not avoided by reason of the hardship, the refusal of specific relief must involve no hardship on plaintiff, who is entitled to be compensated by damages. (1 Story's Eq. 769, 750.) Obviously, the hardship must not be one due to the defendant's own act or mistake, as where a man gave a high price for a piece of ground with a view to build on it a mill, for which the leave of a third party was needed, and then he could not get the leave, he was still forced to take the ground. (*Adams* v. *Weare*, 1 Bro. C. C.

567.) So where there was an agreement to lease two seams of coal and it turned out that they were worthless, and the defendant would really have to pay a large sum for nothing, but the defendant had previously examined the coal for himself, it was held that, in the absence of fraud and misrepresentation, the court will decree specific performance of a speculative agreement, and it will exercise no discretion upon the probable value of the undertaking. (*Haywood* v. *Cope*, 27 L. J. Ch. 468.) On the other hand, the acts of the plaintiff subsequent to the contract may render its terms, though originally fair and equitable, no longer so: thus, where A sold land adjoining his mansion to B, that he might build a mansion thereon, subject to various covenants to protect the enjoyment of A's mansion, and afterwards A pulled down his mansion, and covered the ground with ordinary houses and streets, it was held inequitable to enforce against B the restrictions in his contract, the object and purpose of which had ceased to exist, and A was left to his remedy, if any, by damages. (*Bedford* v. *British Museum*, 2 M. & K. 552.) Acquiescence in such cases by the plaintiff will be a bar to his taking action, and the court will not enforce a contract where mutual restrictive covenants have been so disregarded as to change the character of the property. (*Sayers* v. *Collyer*, 24 Ch. D. 180, S. C. on appeal, 28 Ch. D. 103.) So where the defendant has performed his contract substantially, but not in the precise manner agreed upon, it would be an inequitable hardship not to leave the plaintiff to the relief of such damages as he can fairly claim; as where defendant was to rebuild certain houses, and some of them, though not rebuilt, were so repaired as to be as good as new. (*City of London* v. *Nash*, 3 Atk. 512.)

This doctrine of hardship has in two cases been applied so as to compel performance of a contract with a variation, though neither case would have come within s. 26. Thus, if land sold is subject to a covenant against building and so on, but no stipulation has been made that the purchaser should enter into a like covenant, it would be an inequitable hardship that the seller should have to part with his land, and yet retain his liability; and, therefore, in such a case the purchaser cannot enforce the contract without submitting to enter into the covenant, whilst the seller cannot compel the purchaser to enter into it, but he is left to his election either to be relieved from the contract, or to take it with the covenant. (*Moxhay* v. *Inderwick*, 1 DeG. & S. 708; *Lukey* v. *Higgs*, 1 Jur. N. S. 200; Sugden's V. & P. 31.)

The following is a case in which the court may properly exercise a discretion to decree specific performance :—

III. Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

Illustration.

A sells land to a railway company, who contract to execute certain works for his convenience. The company take the land and use it for their railway. Specific performance of the contract to execute the works should be decreed in favour of A.

Here there has been part performance by the plaintiff, or, what is the same thing, the suffering of loss consequent upon the contract. But still the contract must be one capable of performance, for if the court had no jurisdiction in the original subject-matter of the contract it cannot give the relief; and if specific performance of a parol agreement is sought on the ground of part performance, there must be no uncertainty as to the agreement, and the part performance must be shown to have been done in accordance with the agreement, and to have referred to it. (*Kirk* v. *Bromley Union*, 2 Phill. 640; *Price* v. *Salisbury*, 9 Jur. N. S. 838.) The general principle is much the same as that adopted for another purpose in English equity, where it is a well-recognised rule, that if in any particular case the acts of part performance of a parol agreement as to an interest in land are to be held sufficient to exclude the operation of the Statute of Frauds, they must be such as are unequivocally referable to the agreement; in other words, there must be a necessary connection between the acts of part performance and the interest in the land which is the alleged subject-matter of the agreement; it is not sufficient that the acts are consistent with the existence of such an agreement, or that they suggest or indicate the existence of some agreement, unless such agreement has reference to the subject-matter. They must be such as could have been done with no other view or design than to perform the agreement. (*Alderson* v. *Maddison*, 7 Q. B. D. 174; *Humphreys* v. *Green*, 10 Q. B. D. 154.)

The Illustration is probably the case of *Storer* v. *G. W. Ry. Co.* (2 Y. & C. (C. C.) 48), but there have been other like cases. (See *Wilson* v. *Furness Ry. Co*, L. R. 9 Eq. 28; *Greene* v. *West C. Ry. Co.*, L. R. 13 Eq. 44). Here the plaintiff had parted with the land, and so could not himself do the work which the defendant had contracted to do,

and thus ascertain the damages, and then, as was said in the case, though performance may involve some hardship upon the defendant, yet as that is due to himself, it can be no defence, at least, when the thing he has contracted to do is "reasonably possible." The principle is that when an agreement for valuable consideration between two parties has been partially performed, the court ought to do its utmost to carry out that agreement by a decree for specific performance. It is its duty, as far as it is possible to do so, to ascertain the terms of the agreement, and to give effect to it. Although there may be considerable vagueness in the terms, and although it may be such an agreement as the court would hesitate to decree specific performance of, if there had not been part performance, yet when there has been part performance the court is bound to struggle against the difficulty arising from the vagueness or other impediment. (*Hart* v. *Hart*. 18 Ch. D. 685.) The question of performance is, as a rule, one of fact for the decision of the courts. See the case of *Howther* v. *Heaver* (41 Ch. D. 248.)

The cases on the execution of works have already been noticed under s. 21, clause (*b*), ninth Illustration.

(*d*) *For whom Contracts may be specifically enforced.*

23. Except as otherwise provided by this chapter, the specific performance of a contract may be obtained by—

Who may obtain specific performance.

(*a*) any party thereto;

With this section begins what is really the second part of the chapter. Hitherto we have considered what contracts may or may not be specifically enforced; we have now to consider for and against whom contracts, otherwise enforceable, may or may not be enforced; hitherto the application of the specific relief has been tested and limited with reference to the contract itself, and now it is to be further tested and limited with reference to the persons affected by the contract.

(*b*) the representative in interest, or the principal, of any party thereto: provided that, where the learning, skill, solvency, or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his

representative in interest or his principal shall not be entitled to specific performance of the contract, unless where his part thereof has already been performed ;

Here the plaintiff is supposed to be either the assignee of the contract from the original obligee, or his legal representative after his death, or the undisclosed principal of the party named as such on the contract. The questions when, how, and what contracts are assignable, and when an undisclosed principal is entitled to sue upon a contract made nominally by another, are all matters governed by the general law of contracts, and in no way peculiar to specific performance. In *Corbet* v. *Plowden* (25 Ch. D. 678), a mortgagor in possession made an agreement for a lease of 21 years to the defendant. Then the mortgagees asserted their paramount title and required the defendant to pay rent to them which he did. Defendant then by notice put an end to his tenancy. Held that there was no privity between a mortgagor and a mortgagee as to leases made by the former after the mortgage ; consequently the mortgagees having asserted their paramount title they could not enforce the agreement against defendant who had become a mere tenant from year to year and was entitled by notice to end the tenancy. It would have been otherwise if the agreement had been made with the concurrence of the mortgagees. The proviso in the clause is that part of the general law which, from an equity too obvious to need exposition, bears upon this form of specific relief. This clause is very distinguishable in its scope from clauses (*e*) and (*f*), as here it is the succession by transfer to the contract itself that is regarded, and gives the right to sue ; but in them it is the succession, or right of succession, to an object affected by some contract that is regarded, and gives a right to sue to enforce such contract.

(*c*) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder ;

This is an important clause, though perhaps it will not at present be of frequent application in India. In treating of settlements we have seen (*ante*, p. 58) how in respect to marriage settlements this clause settles all doubts in English cases as to whether collaterals, or others, who, in a sense at least, are mere volunteers, can enforce benefits stipulated for them.

Marriage settlements.

In *Mackie* v. *Herbertson* (9 Ap. Cas. 303) the general rule is stated, that when the persons who are within the consideration of the marriage take only on terms which admit to a participation with them, others who would not otherwise be within the consideration, then, it is not the matrimonial consideration, but the consideration of the mutual contract that extends to and comprehends them. The reasonable rule is that all beneficially entitled under the contract of settlement are within the valuable consideration of the marriage, and so competent to enforce stipulations in their own favour. But in cases of this kind we must be careful to see whether the whole settlement is covered by the consideration of marriage: thus, where A having a child, C, by a former marriage, marries B, and property is settled, and C takes an interest in certain property of A; the question whether C is interested under the marriage settlement depends upon the distinction whether the interest provided for C was part of the reciprocal considerations between A and B; if so, it is part of the marriage contract; or whether the property settled by A on C was merely part of his poperty left out of the marriage settlement, and which A chose to settle on C; if so, it is not within the consideration of the marriage, but is merely a separate voluntary settlement by A in favour of C. (*Price* v. *Jenkins*, 4 Ch. D. 492, and 5 Ch. D. 619; *Gale* v. *Gale*, 6 Ch. D. 144).

The marriage settlement of a widower in favour of the children of a former marriage is deemed to be voluntary, *secus* in case of a widow. (*In re Cameron and Wells*, 37 Ch. D. 32). On the rights of children under a separation deed between husband and wife, and how such covenants may be enforced for the benefit of children, see *Gandy* v. *Gandy* (30 Ch. D. 57). And as to the rights of a mere volunteer under a defective execution of a voluntary settlement see *In re Anstis* (31 Ch. D. 596).

The general doctrine as to the position of volunteers under other agreements has been stated in treating of trusts (*ante*, pp. 10, 60). There remains the other kind of contract here mentioned, embodying a compromise of doubtful rights between members of the same family. As to such the English rule has thus been stated: "An agreement entered into to secure the peace of a family, though resting on contract, will be supported and enforced at the instance of any one of the persons who are to take a benefit under the arrangement and those claiming under him, though the party seeking to enforce it may not have contributed

Family compromises.

any portion of the consideration; the doctrine as to volunteers is not applied to such cases." (2 Spence's Eq. 288.) It will be convenient to consider here what constitutes a contract of this kind enforceable under this clause. The leading case is *Stapilton* v. *Stapilton* (2 L. C. in Eq. 836), where a father had two sons, and there being a doubt as to the legitimacy of the eldest, he made an arrangement with them by which on his death the estate would descend to them in equal shares, and as it was strictly entailed to the eldest son, it was essential that both sons should be parties to the deeds to carry out this arrangement. The eldest son died, leaving a son, and then the father died; and afterwards the eldest son was found to be illegitimate; but his son was allowed to enforce the agreement against his uncle, though the arrangement contemplated had really not been perfected, but equity held as done what was agreed to be done. In its own details it was a strong case, but it established the general principle that an agreement entered into upon a supposition of a doubtful right, though it afterwards comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for the right must always be on one side or the other; and therefore the compromise of a doubtful right is a sufficient foundation of an agreement. And especially where agreements are entered into to save the honour of a family, and are reasonable ones, a court of equity will, if possible, decree a performance of them. There have been numerous cases following this decision, but it should be noted that clause (*c*) is limited to family compromises, though the principle of upholding compromises of doubtful claims from the policy of preventing litigation, is applicable to all parties, and is favoured in most systems of law. The true consideration for such a compromise is the abandonment of the claim, and not the sacrifice of the right; and hence the reality of the right is immaterial, if the claim was *bonâ fide*. In *Miles* v. *The New Zealand, etc., Co.* (32 Ch. D. 266) the court of appeal decided that the abandonment of a serious claim honestly made is a good consideration for a contract, even though the claim may subsequently turn out to be without foundation. This was laid down in numerous decisions; vide *Cooke* v. *Wright*, 1 B. & S. 559; *Callisher* v. *Bischoffoheim* (L. R. 5 Q. B. 449); and *Ockford* v. *Barelli* (L. R. 20 W. R. Eng 116.) The court of appeal dissented from the view taken by

General principle.

Other compromises of doubtful claims.

Lord Esher in *ex parte Banner* (17 Ch. D. 480) that for forbearance to sue to constitute a valid consideration it was necessary not only that the claimant should believe that he has good cause of action, but that the claim should be a really doubtful one. Fraud will vacate such an agreement, as any other; and so will error or mistake, if as to a matter furnishing the motive of either party, but not a mistake as to the subject-matter compromised, for every doubtful right involves some ignorance or mistake as to fact or law, otherwise there would be no doubt, and nothing to compromise.

Thus, where A and B were adjoining landowners and claimed mutual rights, and, by way of compromise, A gave up his claims, and B agreed to pay him an annual sum, and then A's claim proved to be unfounded, and B refused further payment as being without consideration, after laying down the doctrine above stated, the limit of the rule as to mistake in such cases was thus explained. If the error relied on be in a matter of fact, and the fact be one not included in the compromise, and of such a character that it must be considered as the determining motive of either of the parties in entering into the agreement, its existence is regarded as a condition implied though not expressed, and then, if the fact fail, the foundation of the agreement fails. Thus if a compromise assumes the genuineness of a deed or will, and it turns out to be forged or revoked, the agreement founded upon this assumed fact fails. But where the compromise is to settle disputes about a right, its object is to avoid litigation as to the validity of that right, and the right is not assumed as a fact, but the giving up the claim to the right is the fact on which the compromise is founded, and though it turn out that the right claimed was unfounded, there is then no failure of the consideration for the agreement. (*Trigge* v. *Lavallée*, 9 Jur. N. S. 261.)

Mistakes and doubts as to rights distinguished.

Though if a doubt is raised between parties as to their rights, and, adverting to that doubt, they come to an agreement, in family matters, the court goes a long way to carry it into execution; yet if there be a supposition of a right without a doubt upon it, it would be too much to execute an agreement entered into upon such supposition, if unfounded. (*Stockley* v. *Stockley*, 1 V. & B. 31.) Thus, where the children of a deceased remainderman claimed against the tenant-for-life in possession to have their portions raised out of the estate from the death of their father, and an

arrangement was come to, which, proceeding on the supposition of he validity of the claim, compromised the amount to be paid, and it turned out that the claim itself was unfounded, the agreement was set aside; for what was compromised was not the liability to have the portions raised immediately, but something collateral to it, namely, the amount payable on that account; the liability was in fact never compromised, but was assumed, and the arrangement was limited to matters flowing out of what was taken to be undoubted. (*Lawton* v. *Campion*, 18 Beav. 87.) So, where A had two sons, B and C, and by a settlement the estate was strictly settled in-tail-male, and A died, and then B leaving daughters, and then C leaving a son, and a fishery, part really of the entailed estate was assumed to be B's separate property, and C's son agreed to rent it from B's daughters, the agreement was set aside. It was said, "In the maxim *ignorantia juris haud excusat* the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law, but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded upon a common mistake. Now that was the case with these parties. B's daughters believed themselves to be entitled to the property, C's son believed that he was a stranger to it, the mistake is discovered, and the agreement cannot stand." (*Per* Lord Westbury in *Cooper* v. *Phibbs*, L. R. 2 H. L. 170.) In another case (*Beauchamp* v. *Winn*, L. R. 6 H. L. 223), which was also one for rescission, it was indeed said: "The peculiarity of this case is that the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. This is very different from the ignorance of a well-known rule of law. And there are many cases to be found in which equity, upon a mere mistake of law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such mistake." (*Ibid*, 234.) But, with much deference, while I doubt not the existence of such cases, I would submit that their true explanation is that given above by Lord Westbury. That a grant, rightly construed, means x and not y, is surely a fact; whether its construction should be x or y may be a

Maxim *ignorantia juris* explained.

question of law, but the result of the matter of law when ascertained is a fact. If A supposes it to be *y* when it is really *x*, he makes a mistake of fact, just as in *Cooper* v. *Phibbs* that the *jus* or private right of ownership to *blackacre* is in A, and not in B, is a matter of fact, though whether this fact is one way or another may be a question of law. Hence, a mutual mistake or error of this nature will be a defence to a suit for specific performance, and a unilateral mistake or error will not be, unless it is such as to bring the case within s. 28, clause (*c*). (See Ind. Cont. Act, ss. 21, 22.) These cases of mistake as to some matter inducing to a contract are, of course, very distinguishable from cases of mistake as to the legal effect of the contract itself, such as are contemplated by s. 26, clauses (*b*) and (*d*).

Requisites to family compromises. Full disclosure.

An agreement by way of family compromise will not be sustained, if, by design or even by accident, there has not been a full disclosure of *all material* circumstances in the knowledge of one of the parties. Thus where two brothers agreed to divide the family estates, there being a doubt as to the legitimacy of the elder, but the younger knew at the time of a private ceremony of marriage between their parents, which he did not disclose, the agreement was, upon proof of the legitimacy of the elder brother, rescinded after the lapse of nineteen years. (*Gordon* v. *Gordon*, 3 Swans. 400.) In the course of the judgment it was laid down, that in such a case there must not only be good faith and honest intention, but full disclosure, and without full disclosure, honest intention is not sufficient. And whether the omission of disclosure originated in design, or in an honest opinion of the invalidity of the ceremony and of a want of obligation on the other's part to make the communication, the agreement cannot be sustained. In another case it was said that a family arrangement could not be sustained where there had not been that full disclosure of the legal opinions which one of the parties had received, and of the state of the accounts, which the rules of equity would require. (*Harvey* v. *Coole*, 4 Russ. 58.) And where a husband who had separated from his wife, compromised, for a small payment, his claim upon property descended to his wife, the mere non-disclosure (though without fraud) of the real amount of the property was held sufficient to set aside the agreement. (*Groves* v. *Parkins*, 6 Sim. 576.) So the special relation in which one party stands to the other, as guardian to ward, or parent to child, may intensify the need of full faith.

In regarding claims to upset re-settlements of family estates, the court will give weight to considerations which in other cases would not be allowed in the scale. For the validity of such a re-settlement, the son being tenant in tail in remainder, it is not necessary for the son to have independent advice, and the influence of the father would not be considered by the court. (*Hoblyn* v. *Hoblyn*, 41 Ch. D. 200.)

Consideration.

When it is laid down that a family compromise must be reasonable, we are not to understand that the consideration is adequate, and there is no great inequality; but that the circumstances are such as to demonstrate that no undue advantage was taken by either party of the other. (1 Story's Eq. 131, note (5).) Thus, the court will never hold parties acting upon their rights, doubts arising as to those rights, to be bound, unless they act with a full knowledge of all the doubts and difficulties that arise. But if parties will, with full knowledge of them, act upon them,

Knowledge.

though it turns out that one gains a great advantage, if the agreement was fair and reasonable at the time, it shall be binding. (*Gibbons* v. *Count*, 4 Ves. 849.) But the knowledge need not be that of the parties themselves; it is enough that the agent of the party had the knowledge, and then the client will be bound by his acts, and affected by the information he received. For if it were necessary to show knowledge in the principal, and a distinct understanding of all the rights and interests affected by the complicated arrangements which are constantly taking place in families, very few, if any, could be supported. (*Stewart* v. *Stewart*, 6 C. & F. 911.) Lastly, in these, as indeed in all cases of compromise, there may be present circumstances showing such gross ignorance of rights, or misunderstanding of the nature of the transaction, or such liability to imposition, habitual intoxication, and want of professional advice, though falling short of fraud, as to make the agreement too unfair, inequitable or unreasonable to be specifically enforced. (1 Story's Esq. 133.)

Compromise evidenced by conduct.

Further, there may be sufficient evidence from the mere conduct of the parties, of a family arrangement which the court would uphold, although there was no formal contract between the parties, and although there were no rights in dispute; for if sufficient motive for the arrangement is proved, the court will not consider the *quantum* of the consideration. Thus, where A died, leaving a widow and two

sons, and by a will, which was too informal for probate, left all h property equally between the two sons, and the property consiste partly of real property, some of which would have descended to th elder son and some to the younger, and partly of personal property and the stock-in-trade of a going business, and then the two sons jointly carried on the business and treated all the estate as common property, and the widow did not seek to enforce her right of dower or thirds, this was held sufficient evidence, after the lapse of twenty years when the widow was dead, and the two sons had quarrelled, of a family arrangement such as the court would uphold. The widow's foregoing her claims, and the younger son's consent to carry on the business were sufficient consideration to prevent its being a mere voluntary agreement. Turner, L.J., said: "It was strongly argued that the cases extend no further than to arrangements for the settlement of doubtful or disputed rights, and that in this case there was not, and could not be, any doubtful or disputed rights; but this, I think, is a very short-sighted view of the cases as to family arrangements. They extend, as I apprehend, much further than is contended for on the part of the appellant, and apply, as I conceive, not merely to cases in which arrangements are made between members of a family for the preservation of its peace, but to cases in which arrangements are made between them for the preservation of its property . . . The court does not in such cases inquire into the *quantum* of consideration. Here the agreement which was made could not be carried into effect without the concurrence of the two sons, nor could it be carried into effect without the concurrence of the widow also." (*Williams* v. *Williams*, L. R. 2 Ch. 294, 304.) It is true that in terms clause (*c*) is limited to a compromise of doubtful rights, but it is clear that in a like case to *Williams* v. *Williams*, precisely the same decision must have been given in our courts, whichever of the parties affected by the agreement had been the litigant, and therefore the case is of the more value as showing how far the principle of clause (*c*) must extend. (See 2 Spence's Eq. 292-3.)

(*d*) where the contract has been entered into by a tenant-for-life in due exercise of a power, the remainderman;

This is because powers given to a tenant-for-life to make contracts which, as such, he could not otherwise make, have as their motive the better management and enjoyment of the estate: such is a power to

lease for a term which may extend beyond his own life, and hence a remainderman is within the scope of the benefit of such power, and has an interest to enforce a contract made in exercise of it, and the tenant-for-life in exercising it contracted as well on behalf of those in remainder as of himself. Thus where lands are devised to A for life, remainder to B for life, with power to A to make leases, and A makes a lease to C and then dies during the term demised, B shall be competent to enforce the covenants, though he is not the assignee of the lessor A, who is also not strictly his predecessor in title. (*Rogers* v. *Humphrey*, 4 A. & E. 299.)

(*e*) a reversioner in possession, where the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant;

(*f*) a reversioner in remainder, where the agreement is a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach;

It is necessary first to examine the language of these clauses.

Reversioner, how used here.

"Reversioner," is probably used rather in a popular than its proper legal sense. Technically a reversion and a remainder are perfectly distinct from one another, and we may speak of a reversion expectant, or a remainder expectant on the determination of the particular estate; but a "reversion in remainder" is strictly an inaccurate expression; but here, as is often done, the term remainder is used, in a lax sense, in relation to some prior interest so far as regards the possession or beneficial interest. (See Smith's Comp. 232; Williams on R. P., part ii, ch. 1.) I conceive, therefore, that we must give a wide signification to the term "reversioner," so as to include as well a remainderman as also an assignee; the real intent of these clauses being to permit any successor in title or estate to specifically enforce (in all proper cases) covenants made with his predecessor in title or estate. If so, then the assignee of a lessor, and also the assignee of a lessee, will have the benefit of these clauses.

What covenants will be enforced.

Next the covenants must be such as the reversioner is entitled to the benefit of; that is, as English law terms it, they must be covenants that "run with the land," and we shall have to inquire what covenants run with the land, and what are purely collateral and personal.

Who may enforce them.

Further, we must observe that, as the whole section relates to those who may specifically enforce a contract, these two clauses are also limited to cases in which the covenantee or his successor in the estate is plaintiff. But covenants that run with the land may be for the benefit either of the lessor or the lessee. Thus suppose a Hindu widow, or other like tenant-for-life, has entered into covenants, either as lessor or lessee, then, under these clauses, the reversioner or next successor expectant upon her life estate, may either after, or, in certain circumstances, before, the determination of the particular estate, enforce the specific performance of those covenants.*

It will thus be material to consider what covenants between lessor and lessee will run with the land.

Covenants between independent owners.

But besides the simple case of lessor and lessee, there may be cases of covenants by the owner of *whiteacre* as such, with the owner of *blackacre* as such, in respect to something to be done or omitted upon either for the benefit of the other; and, in such a case, these clauses will be applicable to either the reversioner of *whiteacre* or of *blackacre*, according as the one or the other needs to seek the specific performance of the covenants in his favour. There have been numerous cases of this kind.

Where the reversion is expectant.

Of course so long as the reversion is only expectant, to justify a suit by the reversioner the injury threatened must affect the reversion, and must also be material and not trifling.

Ordinary form of relief.

In practice, the protection or enforcement of covenants that run with the land is more often effected by means of an injunction than by direct specific performance; but by s. 54, second paragraph, the provisions of this chapter are, in cases of contract, equally applicable to relief by injunction.

What covenants run with the land.

The leading English case on covenants that run with the land is *Spencer's case.* (1 Sm. L. C. (ed. 1879) 68.) The English cases, especially at law, are, no doubt, greatly affected by peculiarities of

* The estate of such successor under Hindu law does not square exactly with the definition of either a reversion or a remainder, though as the creation of the law, it may well be called a reversion; this further shows that "reversioner" is here used in a popular rather than a technical sense.

English real property law; the cases in equity are so more or less, but have a wider scope; still, both afford us materials from which to derive principles applicable to any system of law. A covenant which runs with the land is one of which the obligation on the one hand, and the benefit, to be enforced by suit, on the other hand, will attach upon the successive owners of the property. (Smith's Comp. 504.) The phrase "that runs with the land," being a convenient one, I have sometimes gone beyond English technical limits in its use. And first as to such covenants between lessor and lessee.

Summary of *Spencer's case*.

1st and 2nd Resolutions.

The Resolutions in *Spencer's case* (old as it is, for it was decided in the reign of Elizabeth), are, perhaps, still as instructive as ever. Thus the effect of the first and second Resolutions is that when the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is, so to say, annexed to the thing demised, and shall go with the land, and shall bind the assignee, though he be not expressly named; but when the covenant extends to a thing which is not in being at the time of the demise made, it will not bind the assignee unless he is expressly named. But although the covenant be for a man and his assigns, yet if the thing to be done be *merely collateral to the land*, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged.

Example of.

The Illustration given of this is that if the lessee covenant to repair the houses demised to him during the term, that touches the support of the thing demised, and binds the assignee, though not named; but if the lessee covenant to make a new wall upon some part of the thing demised, this will not bind the assignee unless named; and lastly, if the lessee covenant to build a house upon the land of the lessor which is no parcel of the demise, or to pay any collateral sum to the lessor, or to a stranger, this shall not bind the assignee, although named, because it is merely collateral, and in no manner touches or concerns the thing demised. An example of a covenant by a lessor that does not run with the land is a case where, on a lease of a house with a covenant of the lessee to use it as a public-house, the lessor covenanted that during the term he would not build or keep any house as a public-house on his land within half a mile of the demised house; this was, on the part of the lessor, a covenant purely personal; it did not touch or concern the thing

demised, it touched the beneficial occupation of the thing, but not the thing itself. Thus, on the lessee by agreement or otherwise ceasing to use the house as a public-house, the lessor's covenant would necessarily cease also. (*Thomas* v. *Hayward*, L. R. 4 Ex. 311.)

How far now qualified.

Subject to the qualification that an express covenant to do a new thing on the land demised ought to bind the assignee whether named or not, the rest is still good law and sense. One who succeeds to the possession of property subject to an express covenant to do something on it, must equitably be charged with the burden, for it concerns the land. Thus where there was a covenant by a lessee, not naming his assigns, to repair all buildings on, or to be erected on, the lands demised (with liberty to the lessee and his assigns to erect new buildings), it was held that the assignee was liable for non-repair of buildings erected during the term. (*Minshull* v. *Oakes*, 27 L. J. 194 Ex.) But no successor to property can equitably be charged with doing something altogether collateral and foreign to the possession of the land. The right remedy in such a case is against the covenantor or his personal representative, and not against his successor in the land as such.

Other examples.

Other Illustrations of covenants that touch and concern the thing demised are—covenants to cultivate the lands demised in a particular manner; not to carry on a particular trade, or to use a house as a private dwelling-house only; to paint or do other repairs periodically; or, under a license to mine, to pay for injury done to the surface. (*Cockson* v. *Cook*, Cro. Jac. 125; *Congleton* v. *Pattison*, 10 East 136; *Wilkinson* v. *Rogers*, 10 Jur. N. S. 5; *Norval* v. *Pascoe*, 10 Jur. N. S. 792.) But a covenant in case of dispute as to the amount of damage, to have the amount ascertained by arbitration, or a claim to a sum accrued due before assignment, would probably be deemed to be purely collateral and personal. (*Martyns* v. *Williams*, 26 L. J. 117 Ex.)

3rd Resolution in *Spencer's case.*

The third Resolution shows that in the case of a lease of personal goods, a covenant will not run with the goods, for there is not any privity, nor any reversion, but merely a thing in action in the personality, which cannot bind any but the covenantor and his personal representative. Hence on a demise of a house or land, with a stock or sum of money, and a covenant to deliver the stock, &c., at the end of

the term, the assignee of the land shall not be charged therewith, for the rent issues from the land only, and as to the stock the covenant is purely personal, and it may be the stock will be wasted by the lessee and not have come to the assignee. So, it has been held that where J B, the owner in fee, conveyed all his estate to A, with a covenant to pay him and his heirs for ever a rent, and to build on the land certain houses to secure the rent, the covenant was a purely personal one; for there was no estate left in J B in the land, and the right to the rent being not connected with it, but purely personal, the covenant to build was merely accessory to this personal right, and if one did not run, the other could not. (*Milnes* v. *Branch*, 5 M. & S. 417.) This is an example of the important principle that there cannot be annexed to the ownership of land, by means of personal contracts, special burdens inconsistent with the ordinary incidents of such ownership, so that they shall pass with the land from predecessor to successor in title. (See *Keppel* v. *Bailey*, 2 M. & K. 517, and a discussion of it hereafter, p. 187.)

4th to 7th Resolution in *Spencer's case*.

The fourth Resolution shows that on a lease of land for years, all implied covenants, that is, all such as the law will annex without more to such a demise, will run with the land, and the fifth Resolution, that where one comes in not by act of the party but by act of the law, as where a lease for years is sold by force of an execution, a covenant that runs with the land shall go with it as a thing appurtenant, into whose hands soever it shall come. The sixth Resolution shows that covenants that are appurtenant to the land run in the same way, whether they are by the lessee or by the lessor; and the seventh Resolution that a covenant that runs with the land runs in like way through any number of transfers; but an assignee is not liable except for breaches of covenant happening while he is assignee, and, therefore, may get rid of his future liability by assigning over to another, though he does not thereby get rid of liability already incurred. (*Taylor* v. *Shum*, 1 B. & P. 21; *Harley* v. *King*, 5 Tyrwh. 692.) As to the original covenantor I would suggest that the right rule should be that, as to covenants that run with the land, whether express or implied, his liability is determined by a complete transfer of his interest in the land. The English rule the other way does not seem satisfactory or certain. (See 1 Sm. L. C. 85; Woodfall's Landlord and Tenant 214.)

Next as to the cases of covenants running with the land other than those between lessor and lessee. In this class it must be admitted that the English cases are not all satisfactory or consistent. First, as to cases in which land has the *benefit* of the covenant. Thus there may be a covenant by A, which as to A is purely personal, made with B as the owner of certain land for the benefit of such land. This is so where A sells certain land to B and then covenants in the ordinary way, as to title or quiet enjoyment; but there have been cases in which A had no prior relation to the land and yet covenants to do something for the benefit thereof. It is obvious that, as to the covenantor and his representatives, the covenant is a purely personal one, and the remedy upon it limited accordingly. But as to the covenantee, the right rule would seem to be that, as the benefit touches and concerns the land, the covenant should run with the land to the covenantee and his successors therein.

Covenants between others than lessor and lessee.

Where the land has the benefit.

Secondly, as to cases in which the land has the *burden* of the covenant. No doubt there has here been much conflict of opinion; but I shall, with deference, submit that there is a reasonable solution to be found of the difficulties. Take, for instance, two such typical cases as *Bedford* v. *British Museum* (2 My. & K. 552) and *Keppel* v. *Bailey* (2 My. & K. 517), the decisions in which have been discussed by very high authority as inconsistent, but which I humbly submit are not so, as in truth the cases are quite different. Omitting needless details, in the first case, A the owner of land, on part of which was a mansion and pleasure grounds, sold an adjoining part to B for the purpose of building thereon a mansion, and B entered into various covenants restrictive of his use of the land. After several transfers of both lands, the question arose whether the successor of A could enforce the covenants against the successor of B. In the second case, the owners of several distinct iron-works joined with others in forming a railway, and severally covenanted to take all the limestone used in their works from a certain quarry, and carry it and also the iron-stone from their mines to their furnaces along the railway, paying a certain tonnage. Afterwards the owner of one of these iron-works sold them to B who had notice of the covenant, and the question was whether it could be enforced

Where the land has the burden.

Two typical cases examined.

against B. Now, in the first case, it is clear that the covenants touched and concerned equally the land of A and the land of B; the former had the benefit, and the latter had the burden thereof; and it was reasonable to decide that they should be respectively benefited and burdened thereby, into whose hands soever they might afterwards come. The covenants were in no way personal, but affected the lands, and only the respective owners for the time being as such. This will, I think, be equally found to be true of many other cases which are in accord with *Bedford* v. *British Museum*.* It is true that the covenants were not enforced in this case against the land of B, because another equity intervened; for the mansion of A having been pulled down, and the whole land built over with houses and streets, the reason of the restriction having ceased, the restriction itself ceased.

According to Hindu law, a conditional grant to persons unborn, who may happen to be the living descendants of the grantees, to take effect at some future and indefinite period, on the happening of certain events, is void. A covenant running with the estate in favour of such grantees would be equally void. (*Chundi Charn Barua* v. *Rani S. Debi*, 15 Ind. Ap. 149.)

Keppel v. *Bailey* considered.

But in the second case it seems to me equally clear that the covenant, neither as to its benefit nor as to its burden, touched or concerned any land. Certainly, as to its burden it did not; for the covenantor did not in any way restrict his use of the land on which his iron-works stood; none of the acts covenanted for were to be done in, or upon, or in respect to the land, but wholly outside the land; they were to be done, if anywhere, entirely upon the railway, and there was an end of them by the time he reached his land. Suppose the owner had covenanted to go and live at the other end of the railway, and travel by it every day, first class, to his works; this would be a purely personal covenant, and he would fulfil this covenant without going on to his works at the end of the journey. It seems to me that the contract or covenant to procure the limestone from a particular quarry, and carry it and other materials for the business of the iron-works in a particular way, as little concerned the land or its ownership, and was as purely personal and connected solely with the business of the foundry, as a contract to deliver from those works one

* See *Holmes* v. *Buckley*, 1 Abr. Eq. 27; *Whatman* v. *Gibson*, 9 Sim. 196; *Tulk* v. *Moxhay*, 2 Phil. 774, discussed at p. 190, *post*.

hundred tons of pig-iron every month would have been. The covenant concerned the business carried on upon the land, but in no way concerned the land or its ownership. Neither as to its benefit did the covenant affect the use of the railway; the object was not to affect the use of the railway as such, but the profits of the trade as carriers; the use of the railway as such was not in any way altered. Much has been urged as to B having bought the land with notice of the covenant, and it has been likened to a man buying land with notice that the owner had previously made a valid equitable agreement to sell the land to another. (Sugden's V. & P. 650.) But, with submission, here is just the whole difference; for in the latter case he buys with notice of a prior contract directly affecting the ownership; indeed, in equity the owner has nothing left to sell, and the second buyer having notice, it follows that in equity he must be concluded by it. But in the other case, if the covenant is a personal one, it does not concern the land, and, therefore, does not concern what alone B purchased, and notice or not is immaterial. To justify the notice affecting B, we must assume, what is the whole question in the matter, that the covenant concerns the land; if it does, he is bound, but if not, then notice is immaterial. It is certainly not accurate to say that the covenant in *Keppel* v. *Bailey* was illegal as regarded the land (Sugden's V. & P. 649); but this was not, I think, really so laid down in the judgment.* (Cf. *Thorpe* v. *Brunfit*, L. R. 8 Ch. 650; and *Luch* v. *Schweder*, L. R. 9 Ch. 475.)

Act IV of 1882, s. 40, purport of.

This distinction which I have suggested seems to be fully recognised in Act IV of 1882, s. 40, where the burden of an obligation imposing a restriction on the use of land, or of an obligation annexed by contract to such ownership, but not amounting to an interest or easement, may be enforced against a transferee with notice or a gratuitous transferee, but not against one for value without notice. Here in both cases the obligation is one that concerns the land, and is annexed to, and is a burden upon, the ownership; and, therefore, while such a

* In *Luker* v. *Dennis* (7 Ch. D. 227), it was said that *Keppel* v. *Bailey* had been overruled by *Catt* v. *Tourle* (L. R. 4 Ch. 654); but clearly this latter case belongs to the class of which *Tulk* v. *Moxhay* (2 Phil. 774), is the leading case, and *Keppel* v. *Bailey* was not alluded to in the judgments in *Catt* v. *Tourle*; and in *Luker* v. *Dennis* there was a personal covenant by the defendant in the mortgage-deed amply sufficient to justify the decision in that case, which was, besides, at once compromised.

case as *Tulk* v. *Moxhay* is clearly included, such a personal obligation as that in *Keppel* v. *Bailey* is as clearly excluded, by the section.

Test suggested in these cases.

Using the old law term *dominium* as expressive of the aggregate of all rights of ownership in land, it may be said that the test of whether a covenant concerns the land so that the burden thereof shall run with it, is that it must be such as that the burden operates more or less as a dismemberment of the *dominium*, and (except, at most, in cases between lessor and lessee) the benefit of it must also operate in behalf of some land, and not merely of some person. I venture to suggest this principle as a solution of the difficulties in the cases; and even in cases between lessor and lessee, whenever a covenant by a lessee runs with the land in the hands of him and his successors, it benefits the lessor, not as a person, but as the reversioner; that is, here also it is in truth the case of the owner of one estate or interest in land as such burdening his *dominium* in favour of the owner of another estate or interest in land as such. This is what seems to be meant in *Keppel* v. *Bailey* when it is said that such a covenant "is only something taken out of the demise, some exception to the temporary surrender of the enjoyment." The incidents of *dominium* or ownership in land are necessarily limited by the nature of their subject-matter; whatever is beyond these can only be matters for personal contract.

In substance, the test here suggested is laid down in the subsequent Scotch case of *Zetland* v. *Heslop* (7 Ap. Cas. 447), where the distinction was taken between restriction, by which it is attempted to impose upon the feuar, for the time being, some personal obligation, and those which relate to the use or employment of the land, or of buildings erected upon it; and it was held that the former cannot, while the latter may, run with the land against a singular successor. This distinction, it was added, would reconcile the decision upon the facts in *Keppel* v. *Bailey* with the English cases. In the Scotch case, the restriction was a covenant not to use any house to be erected on the land as a public-house, without the leave of the superior. It was said that it was the privity of estate between the superior and the vassal which enabled them to contract that these stipulations (if otherwise lawful) should run with the land; but such must not be contrary to law or inconsistent with the nature of this species of property (p. 455). It might be shown that it was intended that the option of

dispensing with the restriction should be left to the superior, and then, in such a case, the superior might by prior conduct, have forfeited the right to maintain the restriction, but the burden would be on the vassal to shew this.

Other examples of covenants running with the land.

To return to the cases. In an early case (*Holmes* v. *Buckley*, 1 Abr. Eq. 27), the owner of two pieces of land granted to H the right to have a watercourse running through them, and covenanted to keep the watercourse cleansed and in repair. After several assignments it was held that the covenant ran with the lands, and bound the successor therein in favour of the successor of H. This case conformed to the principle above suggested, the burden being annexed to the two pieces of land, and the benefit of the covenant running, not indeed with the watercourse (as it has been inaccurately phrased), but with the dominant tenement to which the watercourse was annexed, and served as an easement.

Whatman v. *Gibson*.

Whatman v. *Gibson* (9 Sim. 196) is another typical case, and rests on the same principle. There the owner of a large piece of ground which was laid out in lots for building a row of houses, having sold some of the lots, he and the purchasers executed a deed whereby it was declared that it should be a condition of the sale of all the lots that the several proprietors should observe the stipulations in the deed. And then the parties mutually covenanted that they, and all others who should at any time execute the deed, should observe certain rules in regard to the houses to be erected, and by one they were restrained from carrying on certain trades in them, among others that of a public tavern. This covenant was upheld against a subsequent purchaser with notice of the covenant; the notice was really immaterial, or rather in such a case there must always be at least constructive notice. Now this case is very distinguishable from *Keppel* v. *Bailey*; for here the covenant was clearly something to be done or abstained from, in, upon and in respect to the land itself, and the restriction thus imposed upon each proprietor was so far something excepted out of the ordinary incidents of his ownership, and the consideration for his covenant was the benefit accruing to his lot from the corresponding covenants of the proprietors of the other lots restricting them, in like manner, from doing similar things, or from using their lots in similar ways, to the detriment of the use and valuable enjoyment of his lot. The distinc-

tion between this case and *Keppel* v. *Bailey* seems to me wide and clear.

Tulk v. *Moxhay* (2 Phil. 774) was a precisely similar case. There the owner of several houses in a large square in London, and of all the ground forming the square, sold the gardens in the middle of the square, with a covenant (among other things) not to build upon the gardens. It was held that it ran with the land and bound a subsequent purchaser; and rightly so, for there was clearly a restriction cast upon the ownership of one land for the profit of other land, and the benefit and burden would respectively run with both lands equally. Cases of this kind are of constant occurrence, and all covenants that touch and concern the lands will run with the lands. (See *McLean* v. *McKay*, L. R. 5 P. C. 327.) For other instances of the attempt to enforce covenants running with the land see *Hardman* v. *Child* (28 Ch. D. 712), and *Austerbury* v. *The Corporation of Oldham* (29 Ch. D. 750.) In the latter case *Holmes* v. *Buckley* was discussed. It seems as if it was more on the lines of *Keppel* v. *Bailey* than of *Tulk* v. *Moxhay*. References might also be made to the following authorities:—*Dynevor* v. *Tenant* (13 Ap. Cas. 279); *King* v. *Dickeson* (40 Ch. D. 596); *Fawcett* v. *Holmes* (42 Ch. D. 150); *Mackenzie* v. *Childers* (43 Ch. D. 265); *Buckle* v. *Fredericks* (44 Ch. D. 244); *Cato* v. *Thompson* (9 Q. B. D. 618).

Tulk v. *Moxhay*.

It has been thought by some writers (see Sm. L. C. 84; Sugden's V. & P. 485) that cases like the two last could be worked out only in equity; and it is true that it was said in *Tulk* v. *Moxhay*, that the question did not depend upon whether the covenant ran with the land or not, but that there was an equity arising from the agreement coupled with notice of it by the purchaser; or, as the principle was more accurately stated in another case, "where a man by gift or purchase acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third party, in opposition to the contract, and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller." (*De Mattos* v. *Gibson*, 4 D. & J. 276, 282.) This statement of the governing principle really embodies the distinction which I have suggested between the two classes of cases of which *Keppel* v.

Bailey and *Tulk* v. *Moxhay* are respectively typical instances; and our courts, as courts of equity, would not hesitate to act upon the principle thus laid down.

Cases of rent-charges.

In such cases as *Roach* v. *Wadham* (6 East 289) and *Brewster* v. *Kidgell* (12 Mod. 166, and elsewhere), where the question is whether where A sells land to B, and B covenants to pay a certain annual sum to A and his heirs, the covenant runs with the land in the hands of B's assignee, the principle I have suggested will, I think, furnish a solution. The peculiarities of English real property law and procedure affect all the cases of which the two named are good examples. If on the sale by A to B no estate in the land is left in A, then B has acquired complete *dominium* or ownership over the land, and the contract for the periodical payment is collateral to such ownership, that is, is personal to B, and does not run with the land. But if the covenant makes the payment to be a rent-charge issuing out of the land, and secured by a power of distress or re-entry or other like means of enforcement *in rem* reserved to A, then it is clear that on the sale there passed to B so far an imperfect *dominium* or ownership in the land, and what was reserved to A was a residue of the *dominium* still left in him; and consequently in such a case the covenant ought to be held to run in both directions with the rent or interest carved out of, or charged upon it, in the hands of A's assignee, so as to enable him to sue upon the covenant; with the land itself in the hands of B's assignee, so as to render him liable to be sued upon it. This is a result, if not directly derivable from the English cases, yet recommended by high authority as the best solution of their difficulties. (Sugden's V. & P. 484).

Giving to the word "reversioner," as I conceive must be given, a wider signification than its purely technical sense in English real property law, then these clauses (*e*) and (*f*) will be applicable to all the above classes of cases.

(*g*) when a public company has entered into a contract and subsequently becomes amalgamated with another public company, the new company which arises out of the amalgamation;

(*h*) when the promoters of a public company have, before its incorporation, entered into a contract for the

purposes of the company, and such contract is warranted by the terms of the incorporation, the company.

In both these clauses, it is the company which is the plaintiff seeking to have the benefit of the contract entered into, either by the old company, or by the promoters prior to the formation of the company. In the first case, the new company becomes the transferee of the old company, and is in the like position to that of any other assignee of a contract. The converse case of the liability of the new company on the contracts of the old company, or of the rights of the creditors of the old company, either notwithstanding or in consequence of the amalgamation, against either the old or the new company, is one of much greater complexity, and will have to be considered under s. 27, clause (*d*).

In the second case, provided the contract is one within the scope of the purposes of the company, it succeeds to the benefits of the contracts made on its behalf by the promoters. Again, the converse case of the liability of a company on contracts made by its promoters is quite a different question, which has to some extent been considered under clause (*f*) of s. 21, and will have to be further discussed under s. 27, clause (*e*).

Section 23, clause (*h*), and s. 27, clause (*e*), "were not intended to apply to contracts to take shares but only to contracts for the working purposes of the company." So where a person contracted with the promoters of a company before its formation to take shares and subsequently refused to carry out his contract, and the company, having subsequently been incorporated, sued for specific performance of the contract, the court held that, inasmuch as the contract was made with the promoters, and the latter were not the agents of the company, that clause (*h*) had no application. (*The Imperial Ice Co., Ld.* v. *Munchershaw B. Wadia*, I. L. R. 13 Bom. 415.) Scott, J., says in his judgment (pp. 422 and 423): "It has been decided that a promoter is not an agent for a company before its formation (*Lydney & Wigpool Iron Co.* v. *Boid*, L. R. 33 Ch. D., p. 91), and this contract did not therefore bind the company and could not be held to be made on their behalf. Nor could it be ratified by the company, as the company was not in existence when it was made. Whatever it was, whether contract or offer to take shares, it was addressed to the promoters and not to the company, and the company could not subsequently adopt it, as they were not in existence when it was made, and it was not renewed when the company was established."

(e) For whom Contracts cannot be specifically enforced.

Personal bars to the relief.

24. Specific performance of a contract cannot be enforced in favour of a person—

(*a*) who could not recover compensation for its breach ;

(*b*) who has become incapable of performing, or violates, any essential term of the contract that on his part remains to be performed ;

(*c*) who has already chosen his remedy and obtained satisfaction for the alleged breach of contract ; or

(*d*) who, previously to the contract, had notice that a settlement of the subject-matter thereof (though not founded on any valuable consideration) had been made and was then in force.

Illustrations

to clause (*a*) :—A, in the character of agent for B, enters into an agreement with C to buy C's house. A is in reality acting, not as agent for B, but on his own account. A cannot enforce specific performance of this contract.

to clause (*b*) :—A contracts to sell B a house and to become tenant thereof for a term of fourteen years from the date of the sale at a specified yearly rent. A becomes insolvent. Neither he nor his assignee can enforce specific performance of the contract.

A contracts to sell B a house and garden in which there are ornamental trees, a material element in the value of a property as a residence. A, without B's consent, fells the trees. A cannot enforce specific performance of the contract.

A, holding land under a contract with B for a lease, commits waste or treats the land in an unhusbandlike manner. A cannot enforce specific performance of the contract.

A contracts to let, and B contracts to take, an unfinished house, B contracting to finish the house and the lease to contain covenants on the part of A to keep the house in repair. B finishes the house in a very defective manner : he cannot enforce the contract specifically, though A and B may sue each other for compensation for breach of it.

to clause (*c*) :—A contracts to let, and B contracts to take, a house for a specified term at a specified rent. B refuses to perform the contract. A thereupon sues for, and obtains, compensation for the breach. A cannot obtain specific performance of the contract.

General principle of the section.

Under this section the ground of objection to specific performance is not derived from the nature of the contract, but solely from the acts or conduct of the claimant; and in this respect this section is distinguishable from preceding sections. Thus under clause (*a*) there is nothing in the contract itself to prevent compensation being recovered, but it is some objection personal to the plaintiff; as in the Illustration where the objection is that professing to buy as the agent of B, he really bought on his own account, this Illustration being in precise accord with s. 236, Indian Contract Act. The English cases agree with the Illustration to clause (*a*), the ground of decision being that a person may very well agree to sell property to one person or to sell it on easier terms to one person than he would to any other. (*Philips* v. *Buckingham*, 1 Vern. 227; Sugden's V. & P. 183.) In one case C had consulted A (an advocate) as to the sale of certain houses, and A made an offer for them which he described as that of B, but which was in truth made for himself in collusion with B, who was to have only a partial interest in some of the houses, and it was held that the contract could not be enforced, and might be rescinded. Here there was an additional element of fraud. (*McPherson* v. *Watt*, 3 Ap. Cas. 254.) But it has been held that if the seller falsely assume the character of agent when he is the real seller, specific performance will not therefore be refused unless the buyer can prove damage or that the misrepresentation induced him to enter into the contract. (*Fellowes* v. *Gwydyr*, 1 Sim. 63; Sugden's V. & P. 184.) But this last case would also be within the terms of s. 236, Indian Contract Act, and damage or not is immaterial. In the converse case of one buying nominally as principal when in truth he is an agent, the misrepresentation has been held to be immaterial, and not to justify the refusal of specific performance. (*Hall* v. *Warren*, 9 Ves. 605; *Nelthorpe* v. *Holgate*, 1 Col. 208.) The case seems within the terms of s. 231, Indian Contract Act, and the defendant ought then to be allowed to prove damage or that he was induced by the misrepresentation to contract, and so justify a refusal of specific performance. (See *Smith* v. *Wheatcroft*, 9 Ch. D. 230.)

Illustration to clause (*a*).

The other clauses.

Again, under clause (*b*) it is not any part of the contract itself that has become incapable of performance (which is the case contemplated under ss. 13 to 16), but it is the plaintiff who personally is incapable of performing what is

otherwise very possible of performance; or again, the breach of an essential term of the contract is due to the personal default of the plaintiff, and not to any defect in the contract, as in cases under s. 21. So again under clause (*c*) it is the personal act of the plaintiff that he has already elected to avail himself of his alternative remedy; and under clause (*d*) it is his being personally fixed with notice of the rights of third parties that renders his own claim to specific relief inequitable.

Clause (*a*).

In clause (*a*) the words "could not recover" are, I apprehend, used in the sense of "ought not to recover;" for it is default of the party that is regarded in this section. The principle involved is one of very general application; thus where there was an agreement between the plaintiff, a publisher, and defendant, an author, as to a book to be composed by the latter, and the title page insisted upon by the plaintiff was untruthful, and a fraud upon the public, it was held that the defendant was justified in refusing to supply the text, and that no damages could be given against him. (*Post* v. *Marsh*, 16 Ch. D. 406.)

Clause (*b*).

Clause (*b*) will apply equally to default in respect of acts which ought to have been already done, as of acts to be done hereafter; and as to both alike, the act must be one essential, and not merely trifling and immaterial. This distinction has been already noticed in considering ss. 14, 15, and the Illustrations to this clause afford other examples. In the first of these the insolvency of the plaintiff renders him incapable of performing his part of the contract, and it is this incapacity rather than mere technical insolvency that constitutes the ground of objection. In the second and third Illustrations the acts of the plaintiff are destructive of the purpose of the contract, and are done in the former by the seller, and in the latter by the buyer, and here if done after the grant of the lease would generally justify its revocation, and it is a general principle that specific performance of a contract will not be enforced in favour of a party who has already been guilty of acts which would justify the contract being revoked. The kind of case that often illustrates this clause is where a tenant has a right to a renewal of his lease upon giving a certain notice, and having performed the covenants of the current lease; and then generally a substantial performance of such would be a condition precedent to the right. (*Bastin* v. *Bidwell*, 18 Ch. D. 238.) Where a lease for 21 years was renewable for ever at the option of the lessees on notice by them, and payment of a fine of £1,000

and execution of a new lease, it was held that a notice before the expiry of the term was essential as the lessor was entitled to know immediately on the expiration of the term whether he had a tenant or not; but that the notice given by the Secretary of the lessees to one of the trustees for the lessors, though not formal in words, and given only on the day before the term expired, was sufficient: and that as to the payment of the fine and the execution of the new lease, this was not a condition precedent to be performed before the expiry of the term, but to be done simultaneously at any reasonable time after the term expired, interest on the fine being charged for the interval (*Nicholson* v. *Smith*, 22 Ch. D. 640). The decisions on what is a condition precedent are somewhat conflicting.

The fourth Illustration is very like *Tildersley* v. *Clarkson* (30 Beav. 419), only there the lessor was to finish the house, and the lessee to do the repairs during the term. A stronger case was *Lamare* v. *Dixon* (L. R. 6 H. L. 423), where cellars were to be put by the lessor into good condition, and notwithstanding the lessee had entered, and there had been such delay as to raise the question of his acquiescence, yet, owing to the default of the lessor, the court, in its discretion, refused to force the lease upon the defendant. In the very similar case of *Oxford* v. *Provand* (L. R. 2 P. C. 156), the conduct of the parties between the agreement, and the suit had also to be considered; but the decision went upon the lines of *Cutter* v. *Powell* (2 Sm. L. C. 1), which is not a case within the sphere of our present discussion, and though the judgment was that of a very great common law Judge, the case is scarcely an authority in equity. In cases under clause (*b*) such questions as whether plaintiff's part was an independent stipulation, or whether its performance has been waived or prevented by the defendant, may have to be considered; but these are questions in the general law of contracts.

Clause (*c*) and its Illustration call for no remark.

Clause (*d*) and clause (*c*) of s. 25.

Clause (*d*) and the converse case in clause (*c*) of s. 25 have already been to some extent noticed in treating of settlements (see *ante*, pp. 59, 60). It remains to notice that in clause (*d*) the words that the settlement "has been made and is in force" show that the settlement, though voluntary, must be executed and not merely executory; but it is not, I conceive, thereby meant that the settlement must be one then being acted upon by the beneficiaries taking the benefits under it; a settlement is "in force" if it is a valid existing instrument, though the

time for the enjoyment of its benefits may not yet have come. So also in Illustration (*d*) to clause (*c*) of s. 25 the settlement may very well be one which has not yet come into active operation; it is enough that the brothers of A or their issue are able to claim under it, and it is immaterial whether what they claim is a present interest in possession, or a future interest expectant upon the determination of some prior interest in A or some other person.

Further, clause (*d*), s. 24, and clause (*c*), s. 25, are unnecessarily correlative; under the former a settlement, though voluntary, is passively protected, when there is notice of it, against a subsequent purchaser for value, by refusing to him specific performance of his contract; and under the latter, a settlement, though voluntary, is passively protected against the settlor by refusing to him specific performance of his subsequent contract for value with a third person. But though there is in both instances an obvious equity in the court declining to do anything at all, and so passively protecting the volunteers, it does not at all follow, nor is it the purpose of either of these clauses to declare, that the court will in any and what cases actively interfere on behalf of beneficiaries, whether volunteers or not, by enforcing settlements. That is a matter not within the scope of the clauses, which is limited to providing that the fact of a prior existing settlement on behalf of third persons may be used as a defence to resist specific performance of a subsequent contract for valuable consideration, in the first case by the settlor as defendant against the purchaser with notice as plaintiff, and in the second case by the purchaser (and here, of course, whether with or without notice) as defendant against the settlor as plaintiff. It seems desirable to mark thus precisely the limit of the scope of both these correlative clauses. On the subject of a beneficiary actively enforcing a voluntary settlement, some remarks will be found under s. 54, Illustration (*g*).

25. A contract for the sale or letting of property, whether moveable or immoveable, cannot be specifically enforced in favour of a vendor or lessor—

Contracts to sell property.

by one who has no title, or who is a voluntary settlor.

(*a*) who, knowing himself not to have any title to the property, has contracted to sell or let the same;

(*b*) who, though he entered into the contract believing that he had a good title to the property, cannot, at the time fixed by the parties or by the court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt;

(*c*) who, previous to entering into the contract, has made a settlement (though not founded on any valuable consideration) of the subject-matter of the contract.

Illustrations.

(*a*) A, without C's authority, contracts to sell to B an estate which A knows to belong to C. A cannot enforce specific performance of this contract, even though C is willing to confirm it.

(*b*) A bequeaths his land to trustees, declaring that they may sell it with the consent in writing of B. B gives a general prospective assent in writing to any sale which the trustees may make. The trustees then enter into a contract with C to sell him the land. C refuses to carry out the contract. The trustees cannot specifically enforce this contract, as, in the absence of B's consent to the particular sale to C, the title which they can give C is, as the law stands, not free from reasonable doubt.

(*c*) A, being in possession of certain land, contracts to sell it to Z. On inquiry it turns out that A claims the land as heir of B, who left the country several years before, and is generally believed to be dead, but of whose death there is no sufficient proof. A cannot compel Z specifically to perform the contract.

(*d*) A, out of natural love and affection, makes a settlement of certain property on his brothers and their issue, and afterwards enters into a contract to sell the property to a stranger. A cannot enforce specific performance of this contract so as to override the settlement, and thus prejudice the interests of the persons claiming under it.

Scope of the section.

Under s. 18 we had laid down what rights a purchaser may actively enforce against a vendor or lessor with an imperfect title, and in this section we have what defences a purchaser may maintain against a vendor or lessor with no title at all; if there is some title, but it is defective in quantity or quality, the defences available to a purchaser are regulated by s. 14, or s. 15. Further, under s. 25 the defence is one arising, not out of the subject-matter of the contract, as in cases under those sections, but out of the personal default of the plaintiff.

Clause (*a*).

The Illustration (*a*) shows the kind of case contemplated by the clause. A did not contract to sell as agent but as principal, and B cannot be compelled to perform with C a contract which he made with A, for that would be to compel him to perform a new and different contract from that which he made. In such a case A is entirely without remedy against B, but B has a remedy by damages against A, the measure of which will vary according as A acted with or without fraud, and as the contract was one of sale or of lease. If a man sell an estate to which he has *no title*, and afterwards acquire a title, he may (as I conceive, though I know of no case on the point) enforce specific performance provided the time fixed for the completion of the contract has not passed. We have already seen (s. 18, cl. (*a*), *ante*, p. 127), that if a man sell an estate to which he has *no title*, and after the conveyance acquire the title, he will be compelled to convey it to the purchaser; this being an obvious equity. (Sugden's V. & P. 297.)

Clause (*b*). Reasonable doubt in title.

This is a state of things of constant occurrence, and has often been the subject of decision. If a man has not got a marketable title, he has, practically, so far as a purchaser is concerned, no title at all. The practical difficulty in the rule is as to what constitutes a reasonably doubtful title, and the peculiarity of the rule is, that since every title must be either good or bad, a court should recognise the possibility of such a thing as a merely doubtful title. Practically, a doubtful title is one on which the court either itself entertains doubt or considers that other competent persons may reasonably entertain doubt, although the court itself may have a favourable opinion of the title, or although there may have been a decision on the principle involved, but which the court may and does doubt; and the rule exists because the procedure of the court does not permit of a judgment *in rem* binding the whole world, but only of one conclusive between the parties and their privies; and the remedy sought being specific relief, the court has to exercise its discretion, and may equitably decline to force a title upon a purchaser where there is a reasonable chance that hereafter some third person may arise to dispute the title. (*Pyrke* v. *Waddingham*, 10 Hare, 1; *Mullings* v. *Trinder*, L. R. 10 Eq. 449; Sugden's V & P. 320; Thackwray and Young's Contract, 40 Ch. D. 34; Bryant and Burmingham's Contract, 44 Ch. D. 218.) (As to cases of

defects in title, by conduct, see cases noted under s. 35.) Where a contract of sale provided for the handing over of the title-deeds of the property to the purchasers in the following terms "at the time of the execution of the deed of sale you" (*i.e.*, the vendor) "are to give us" the purchasers "the title-deeds, vouchers, and bills whatever there may be relating to the said property," it was held that this clause meant that whatever documents of title were necessary under the term of the contract, or under the general law, should be handed over by the vendor to the purchaser at the time of the execution of the deed of sale. The vendee after inspection of the title-deeds rescinded the contract on the ground that the title was not good, and on suit for specific performance brought by the vendor, the court held the title to be defective. The vendor is bound to give the purchaser a good title, or, in other words, a title free from reasonable doubt. In the absence of a contract providing that the vendor should show only such title as he could give, or of some other special contract as to title, the general law laid down by cl. (*a*) of this section must prevail. (*Haji Mahomed Mitha* v. *Musaji Esaji*, I. L. R. 15 Bom. 657.)

Principles of English cases.

The numberless English cases on what is and what is not reasonable doubt in a title turn mostly on points of pure property law; and the simpler the system of land law, the less opening there will be for any reasonable doubt in a title. A few general principles is all that can be usefully derived from these English cases. The doubt must turn on a point either of law or of fact, though it may sometimes involve both. As to law, the doubt may be (1) general, as upon some abstract rule or proposition of law which is still a moot question, such as that involved in Illustration (*b*); or (2) particular, as upon the construction of a doubtful instrument. As to fact, the doubt may be (1) about a fact which admits of proof, but has not been satisfactorily proved, as in Illustration (*c*); or (2) about a fact such as from its nature admits of no satisfactory proof, as a negative proposition, as that A had no children, or had no notice of some fact, and so on. (Sugden's V. & P. 321, 333; Fry on Sp. Perf. 387.) The tendency of modern cases is to decide upon the title. Thus, it has been laid down that there may indeed be cases in which a question of law may be considered so doubtful that a court would not, on its own view, compel a purchaser to take a title; still, as a

general and almost universal rule, the court is bound, as much between vendor and purchaser as in every other case, to ascertain and determine, as it best may, what the law is, and to take that to be the law which it has so ascertained and determined. The exceptions to this will probably be found to consist, not in pure questions of legal principle, but in cases where the difficulty and doubt arise in ascertaining the true construction and legal operation of some ill-expressed and inartificial instrument. Where a case involves a question of general law applicable to all similar instruments, the court is bound to say one way or the other what the law is, and it cannot, in such a case, escape from that duty by saying that the decision of another court, in taking one view, makes the other view, if held by it, so doubtful that it cannot force it on a purchaser. (*Alexander* v. *Mills*, L. R. 6 Ch. 131; *Forster* v. *Abraham*, L. R. 17 Eq. 351.) As between a court of appeal and a court of first instance, it must now be taken as settled that disapproval of, or doubt as to the title by the latter, does not excuse the former from deciding on the title, as not to do so would be to leave it to the lower court in effect to decide the case. (*Osborne* v. *Rowlett*, 13 Ch. D. 781; *Beioley* v. *Carter*, L. R. 4 Ch. 236; *Radford* v. *Willis*, L. R. 7 Ch. 7.) And as between courts of concurrent grade, where there has been a prior decision on the question which a court in a later case disapproves of, it must be remembered that the only thing binding in a previous case is the principle upon which the case was decided, but that principle must be a right principle and applicable to the case, and it is for the subsequent court to say whether it was a right principle. (*Osborne* v. *Rowlett*, 13 Ch. D. 785.) If in a title there is a doubt apparent that can be settled only by further litigation, as in Illustration (*b*), the purchaser will not be forced thus to buy a lawsuit; and a point of law may be unsettled though there has been a decision upon it. (*Price* v. *Strange*, 6 Mad. 159; *Cottard* v. *Sampson*, 4 De G. M. & G. 224.) Still he will not be permitted to object to a title on account of a bare possibility; mere suspicion ending in suspicion cannot be the legitimate ground of legal decision; but a court must govern itself by a moral certainty, for it is impossible in the nature of things that there should be a mathematical certainty of a good title, and to make a title doubtful, there must be a reasonable, decent probability of litigation. (*Lyddal* v. *Weston*, 2 Atk. 19; *Cattell* v. *Corrall*, 4 Y. & C. Ex. 237.) So, *a mere suspicion* of fraud

which cannot be made out will not enable a purchaser to reject the title. (*McQueen* v. *Farquhar*, 11 Ves. 467.) But if a title would be irregular in the absence of special circumstances, and these are not proved, it is too doubtful. (*Blacklow* v. *Laws*, 2 Hare, 40.) So, although in most cases a purchaser with notice may safely purchase from one who bought without notice, yet the title would not be forced on him, as he would have to incur the risk of notice being after all proved. (*Freer* v. *Hesse*, 4 De G. M. & G. 495; Sugden's V. & P. 328.) As to presumptions of fact generally, a distinction has been taken, that if before a jury it would be the duty of a Judge to give a clear direction in favour of the fact, then it is to be considered as without reasonable doubt; but if it would be the duty of the Judge to leave it to the jury to pronounce upon the effect of the evidence, then it is too doubtful to conclude a purchaser. (*Emery* v. *Grocock*, 6 Mad. 54; Sugden's V. & P. 331.) But particular cases teach little, for instances of doubtful titles vary with the habits of each community and the specialities of each legal system.

Clause (*c*).

This has already been in part noticed (*ante*, p. 198). The English rule is that a contract to sell a settled estate to a person, with full notice of the voluntary settlement, will be enforced at the suit of the purchaser; but the seller cannot himself compel a specific performance of the contract. (Sugden's V. & P. 592.) The first part of the rule is due to a special enactment making a voluntary settlement invalid against a subsequent purchaser for value; but, as we have seen, s. 24, clause (*d*), contains a contrary and more equitable provision. Such a purchaser with notice may very well be left to take whatever other remedy he can get on his contract with his vendor; but he clearly should not be allowed to take away from others the property which he knew that his vendor had no moral right to sell to him. For the latter part of the rule which is adopted by clause (*c*), the reason was thus stated in one case: "One difficulty in the way of assisting the seller is, that he has no equity to defeat the act which he has done himself; but another consideration which has weighed in such cases is, that if you compel a purchaser to take an estate at the instance of such a man, you cannot be quite sure that there may not have been some intermediate acts, which by matter *ex post facto* may have made the settlement good which in its origin was not good." (*Johnson* v. *Legard*, T. & R. 294.)

(f) For whom Contracts cannot be specifically enforced except with a variation.

Non-enforcement except with variation.

26. Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up, in the following cases (namely) :—

(*a*) where by fraud or mistake of fact the contract of which performance is sought is in terms different from that which the defendant supposed it to be when he entered into it ;

(*b*) where by fraud, mistake of fact or surprise, the defendant entered into the contract under a reasonable misapprehension as to its effect as between himself and the plaintiff ;

(*c*) where the defendant, knowing the terms of the contract and understanding its effect, has entered into it relying upon some misrepresentation by the plaintiff, or upon some stipulation on the plaintiff's part, which adds to the contract, but which he refuses to fulfil ;

(*d*) where the object of the parties was to produce a certain legal result, which the contract as framed is not calculated to produce ;

(*e*) where the parties have, subsequently to the execution of the contract, contracted to vary it.

Illustrations.

(*a*) A, B and C sign a writing by which they purport to contract each to enter into a bond to D for Rs. 1,000. In a suit by D, to make A, B and C separately liable each to the extent of Rs. 1,000, they prove that the word 'each' was inserted by mistake ; that the intention was that they should give a joint bond for Rs. 1,000. D can obtain the performance sought only with the variation thus set up.

(*b*) A sues B to compel specific performance of a contract in writing to buy a dwelling-house. B proves that he assumed that the contract included an adjoining yard, and the contract was so framed as to leave it doubtful whether the yard was so included or not. The court will refuse to enforce the contract, except with the variation set up by B.

(*c*) A contracts in writing to let to B a wharf, together with a strip of A's land delineated in a map. Before signing the contract, B proposed orally that he should be at liberty to substitute for the strip mentioned in the contract another strip of A's land of the same dimensions, and to this A expressly assented. B then signed the written contract. A cannot obtain specific performance of the written contract, except with the variation set up by B.

(*d*) A and B enter into negotiations for the purpose of securing land to B for his life, with remainder to his issue. They execute a contract the terms of which are found to confer an absolute ownership on B. The contract so framed cannot be specifically enforced.

(*e*) A contracts in writing to let a house to B, for a certain term, at the rent of Rs. 100 per month, putting it first into tenantable repair. The house turns out to be not worth repairing, so, with B's consent, A pulls it down and erects a new house in its place: B contracting orally to pay rent at Rs. 120 per mensem. B then sues to enforce specific performance of the contract in writing. He cannot enforce it except with the variations made by the subsequent oral contract.

In *Cutts* v. *Brown* (7 C. L. R. 71) the defendants had agreed to sell to the plaintiff "on certain terms and conditions agreed upon," a share in a certain house, and the defendants refusing to convey, the plaintiff filed a suit for specific performance of the contract. The defendants alleged a contemporaneous parol variation and resisted the suit for specific performance unless with the variation they alleged. The court of first instance held that the words "on certain terms and conditions agreed on" only applied to the terms subsequently contained in the document itself and refused to allow the defendants to give evidence of this oral agreement. The court of appeal, however, ruled that the case came within clause (*c*), and that the defendants should be allowed to show that the words "under certain conditions, etc.," referred to conditions outside the contract. Under clause (*d*) both parties are innocent, and equally balked of their purpose through a mistake as to the legal result of their contract Act. Clauses (*a*), (*b*), and (*c*) have been taken from Dart's *Vendors and Purchasers*. They should be given the effect to which Mr. Dart ascribes them (Dart's V. & P. 3rd Edition, p. 1039.)

Principle of the section.

This section "sets out cases in which contracts cannot be specifically enforced except with a variation; and there are five particular cases set out in which a contract may be enforced subject to a variation, such variation being in favour of the defendant." It assumes that the parties or the persons representing them "are agreed as to the existence of the contract, but not agreed as to specific terms. The section provides that, when fraud or mistake of fact, or misrepresentation has induced the defendant to sign an agreement, that agreement can only be enforced on the terms which the defendant intended to agree to." The plaintiff cannot "claim a variation in the terms of his contract, when he finds that the contract itself cannot be carried out." An agreement made by the certificated guardian of a minor to sell land belonging to such minor, at a fixed price but contingent upon the permission of the court, which was admittedly necessary and which was not obtained, could not be specifically enforced. "The contract, such as it was, was not a complete contract at any time. It was contingent upon the permission of the court. The court's permission did not extend to the whole of the contract as set out in the *Shultanamah*." (*Narain Patro* v. *Aukhoy Narain Manna*, I. L. R. 12 Cal. 152.)

This section embodies the results of many English decisions, of which *Woollam* v. *Hearn* (2 L. C. in Eq. 468) is the leading case. It recognises the distinction between a plaintiff *seeking* and a defendant *resisting* specific performance. When the contract is in *writing*, either by the will of the parties or the requirements of the law, a plaintiff may not sue to enforce a specific performance of the written contract with a variation to be proved by oral evidence; for that would be contrary to the ordinary rules of evidence. (See ch. vi, Ind. Evid. Act.) But it is quite another thing to allow a defendant to show that, by fraud, mistake or surprise, the writing does not contain the true contract. Even when the law requires a contract to be in writing, the effect is not to declare that every written contract shall bind, but that an unwritten contract shall not bind. Hence, proof of the variation is permitted to the defendant, and the plaintiff shall not have a decree for specific performance unless he submits to the variation. A good example of this general principle is the case of *Lord Townshend* v. *Stangroom* (6 Ves. 328). There a lessor filed a bill for specific performance of a written agreement for a lease, with a variation as to

the quantity of land to be included in the lease, supported by oral evidence. The lessee also filed a bill for specific performance of the written agreement simply. Both bills were dismissed; the first, because the oral evidence was not admissible on behalf of the lessor seeking specific performance; the second, because it was admissible when adduced by him as a defendant, for the purpose of showing that, by fraud or mistake, the written agreement did not contain the terms intended to be introduced into it.

Plaintiff has an election under this section.

It would seem that under this section the plaintiff is not bound to submit to the variation proved; he cannot have specific performance unless he submits, but he is at liberty to elect not to do so; and he may take instead such remedy as he may be entitled to by way of damages for breach of the contract, though the combined effect of s. 29 and s. 19 is that he must seek it in the same suit and not in a subsequent one. This may be very important to the plaintiff's interests; and the defendant is left helpless unless he can proceed under ch. iii, for he cannot turn round and as plaintiff enforce specific performance except *without* the variation, which is just what the other side wants.

There are *dicta* in some English cases (*Fife* v. *Clayton*, 13 Ves. 546, and *Higginson* v. *Clowes*, 15 Ves. 516) to the effect that the plaintiff has not an option to accept or refuse performance with the variation, but that defendant may insist on a decree of specific performance with the variation which he has proved; but if this is really so, s. 26 does not seem to recognise such a rule, nor is it one to be commended. On the other hand, if the plaintiff submits to the variation, he may insist on specific performance with it, though the defendant is opposed to it, unless, of course, the defence goes to the whole contract. (*Smith* v. *Wheatcroft*, 9 Ch. D. 223.)

Clauses (*a*) and (*b*).

Clauses (*a*) and (*b*) are alike in this, that in each the defect or error relied on in defence is one within the four corners of the writing; but they differ in that in clause (*a*) the vitiating error is one of pure fact, but in clause (*b*) it is one of construction which may involve law, and hence "surprise," as the possible source of error is included in the latter though not in the former clause. Thus in Illustration (*b*), on the right construction of the instrument, the yard was not included, and B erred in supposing it was. Under clause (*a*) some term or fact of the agreement

has been omitted, or added, or varied from what the defendant supposed, and this through fraud by the plaintiff, or mistake of fact by the defendant. Under clause (*b*) the facts or terms of the contract are, on the face of the writing, as agreed upon; but the defendant has misapprehended the legal effects of such terms. And here observe it is not every misapprehension that will vitiate the writing; it must be a *reasonable* misapprehension, that is, such as a man of ordinary capacity, and using ordinary caution, might still, in the circumstances, have fallen into. This limitation of *reasonableness* is not to be found in clause (*a*); it is therefore enough if in fact the defendant was misled; and the reasonableness or otherwise of his blunder is only of value as evidence of the fact of the blunder.

Fraud, mistake, and surprise described.

"Fraud" is a word defined in the Indian Contract Act, s. 17, and therefore used here in that sense. Though "misrepresentation," which is defined in s. 18 of the same Act, is not expressly mentioned in these two clauses, it would, I apprehend, looking at least to clauses (1) and (2) of s. 18, Indian Contract Act, be a kindred and valid ground within the discretion of the court, for maintaining, by way of defence, a variation. "Mistake of fact," though not precisely defined, is described in ss. 20 and 22 of the same Act. "Surprise" is not a word defined or mentioned, and its use has given offence to some English judges and writers; but there is nothing technical or peculiar in it: it means the state of being taken unawares; and when a court of equity relieves on the ground of surprise, it does so upon the ground that the party has been taken so unawares that he has acted without due deliberation, and under confused and sudden impressions. Its true use is where something has been done which operated to mislead or confuse the party on the sudden; and that is how, as I conceive, it is here intended to be used in clause (*b*), though no doubt the word must not be used with dangerous laxity. (1 Story's Eq. 120*n*; 251*n*.)

Clauses (*c*), (*d*) and (*e*).

Under clauses (*c*) and (*e*) the matter of defence is altogether outside of the contract, but under the former it is an addition contemporaneous with, and under the latter an addition or alteration subsequent to, the contract. Between clauses (*c*) and (*e*) there is this difference, that under the former the variation from the writing is by way of addition only; an alteration would fall under clause (*a*). Under clause (*c*) there may also be present misrepresentation by the plaintiff,

which must be understood as defined in s. 18, Indian Contract Act, but the mention of which does not exclude fraud, for if the lesser be a defence much more will the greater be. Under clause (*e*) the variation may or may not involve addition, and there is no suggestion of fraud or mistake, and this clause will be satisfied by a subsequent oral waiver of a written contract amounting to a complete abandonment, though that is a defence not aimed at by this section. Upon this section generally it is to be noted that it does not contemplate in any case that the matter of defence goes to the contract as a whole, and in this respect it is distinguished from sections before and after it; but it contemplates that in every case the original contract may be enforced, though by reason of the matter of defence not precisely as is apparent upon the contract; and therefore it tenders to the plaintiff the option of a performance of it as varied by the matter of defence.

Illustration (*a*).

The case put in Illustration (*a*) is the same as *Gordon* v. *Hertford* (2 Mad. 106), where, instead of a joint bond, the contract was drawn up as a several bond. Similar was another case where it was the intention of both parties that the purchaser should pay certain expenses, but by mistake part of them were left out. (*Ramsbottom* v. *Gosden*, 1 V. & B. 165.)

Illustration (*b*).

Illustration (*b*) to clause (*b*) shows that where the terms of a written agreement are ambiguous, so that adopting one construction they may reasonably be supposed to have an effect which the defendant did not contemplate, that is a ground for defence; but then it is obvious equity that such misapprehension must be reasonable and not arbitrary or trivial; or, as was said in one case, "the court must be satisfied that the agreement would not have been entered into if its true effect had not been misunderstood." (*Watson* v. *Marston*, 4 D. V. & G. 230.) Hence, where there is no ambiguity, either in respect to fact or law, in the terms used, there can be no mistake or surprise which will excuse the performance of the contract as it stands. Thus, in one case, a lessor signed an agreement for a lease for "seven or fourteen years," supposing that the option was thus with him as well as with the lessee. But in law such terms are unquestionable, as they allow the lessee alone to have the option. (*Powell* v. *Smith*, L. R. 14 Eq. 85.) Here, to justify a variation, the lessor was really offering as an excuse a bare mistake as to general law, which by itself was clearly inadmissible.

So, if there is no ambiguity as to matter of fact, no variation can be allowed; thus, if in the Illustration the yard had been expressly excluded. The construction of a document, though always a question for the Judge and not for the jury, may or may not involve a question of law, and for the purposes of clause (*b*), this is immaterial; but the fitness of requiring that where the misapprehension is unilateral, there should be *reasonable* ground for it, is obvious. Where, as under clause (*d*), both parties are alike disappointed by the legal result of the contract as framed, this will generally, if not always, involve some misapprehension of matter of law; but this will not reduce the contract to one of a mutual mistake of law within s. 21, Indian Contract Act; for in the first Illustration to that section the legal result of the contract was precisely what the parties intended, and the mistake of law was the motive to their intention to produce that result; but in Illustration (*d*) to clause (*d*) the intention was to produce one legal result, and by a mistake of law as to how to produce it, a quite different result was, as a matter of fact, produced. Cases of misapprehension constituting a defence to the whole contract will come under s. 28. The case of *Powell* v. *Smith* is further useful as it involved other ingredients, as that the plaintiff had incurred expense under the contract, and could not have been placed *in statu quo*; and a case otherwise within clause (*b*) may often be complicated in like manner. The cases show that it is immaterial whether the plaintiff or defendant is the author of the ambiguity; and in one case the seller was the author of the ambiguity, but had the benefit of the rule, though it was certain that the purchaser supposed he was buying all he claimed. Where a written agreement has been signed, though it is in some cases a defence to an action for specific performance according to its terms that the defendant did not understand it according to what the court holds to be its true construction, the fact that the plaintiff has put an erroneous construction upon it, and insisted that it included what it did not include, does not prevent there being a contract, nor preclude the plaintiff from waiving the question of construction and obtaining specific performance according to what the defendant admits to be its true construction. (*Preston* v. *Luck*, 27 Ch. D. 497.)

Cases within clause (*c*).

The principle of clause (*c*) was recognised in, and may be strikingly illustrated by, the case of *Martin* v. *Pycroft* (2 D. M. & G. 785), in which the plaintiff sued for the specific performance of a written agreement to grant a lease

at the execution of which it was verbally agreed that he should pay defendant a premium of £200, which, by his claim he offered to do; and as there was no circumvention, fraud or mistake, the plaintiff had a decree. This case has been much questioned as a departure from the rule as to the plaintiff proving the variation; but the stipulation was one entirely in favour of the defendant, one that he might have used as a defence, and all that the plaintiff did was to anticipate the defence by admitting and submitting to the variation in his claim.

Case of *Croome* v. *Lediard.*

Another also much discussed case, which is very useful in showing the limit to the operation of either clause (*b*) or clause (*d*) is *Croome* v. *Lediard.* (2 My. & K. 251.) By a written contract A sold to B estate X, and B sold to A estate Y. On the face of the contract the sales appeared to be separate, and not dependent upon each other. The title to one estate failed, and the question was whether the sale of the other could be enforced, or it might be shown by oral evidence that an exchange was what was really intended. But it appeared that the contract was deliberately drawn as it was; the defendant had not therefore been influenced by either fraud, mistake of fact, or surprise; and so the case did not fall within clause (*b*). Both parties were considered to have deliberately intended that the legal result of the contract should be separate sales; and hence it did not fall within clause (*d*). If both parties with their eyes open draw up their contract in one way because they, at the time, think it best to do so, they cannot afterwards ask the court to make and execute a different contract for them, when facts turn out otherwise than they calculated. (Sugden's V. & P. 134.) Similarly, it has also been laid down that where parties omit any provision in a deed, as on the impression of its being illegal, and trust to each other's honour, they must rely upon that, and cannot require the defect to be supplied by oral evidence. (*Lord Irnham* v. *Child*, 1 Bro. C. C. 92; Sugden's V. & P. 144; 1 Story's Eq. 113.) But I doubt if clause (*c*) goes to this extent; certainly, as in the English cases, any show of fraud will let in the variation, but if the omission was deliberate upon a stipulation by the plaintiff without fraud, the terms at least of clause (*c*) would still admit proof of the variation, or rather addition; while, on the contrary, the terms and scope of clauses (*b*) and (*d*) alike justify the limitation just suggested as to them. As to such a case within clause (*c*), when admittedly free from fraud, the remark, however, applies that it must be at all times difficult to

rely, even as a defence, upon a term added by parol to a regular correct contract. (Sugden's V. & P. 135.)

Cases within clause (*e*).

As to cases within clause (*e*), the English rule is that where a written agreement is subsequently varied in part by parol, if it do not amount to a waiver of the contract, but a variation by parol which has not been acted upon, and which was made without consideration, it cannot be made use of as a defence. (Sugden's V. & P. 134.) In Illustration (*e*) it will be noticed that the new contract by way of variation had both been acted upon and was supported by a consideration; and in clause (*e*) it is expressly assumed that the parties have subsequently "contracted" to vary their previous contract, that is, their agreement so to do has all the essentials of a contract, and hence is supported by a legal consideration. The clause is thus substantially the same as the English rule. It must be noted that a subsequent agreement which is substitutionary for the first, and not a mere variation of it, but such that the two could not stand together, is not within the scope of this clause. (*Moore* v. *Marrable*, L. R. 1 Ch. 217.)

In connection with s. 26 the provisions of ch. iii must be borne in mind, and especially s. 34, since one who as defendant may, under s. 26, avail himself of a variation from the written agreement by way of defence, may as plaintiff in certain cases under ch. iii, first sue to rectify the contract, and then apply to have it specifically enforced as rectified. (See also Ind. Evid. Act, s. 92, Ill. (*e*).) This goes far to meet the adverse criticism of the English rule that allows oral evidence to vary a written agreement to be used by way of defence, but not on behalf of a plaintiff. (See 1 Story's Eq. 161 note).

(*q*) *Against whom Contracts may be specifically enforced.*

Relief against parties and persons claiming under them by subsequent title.

27. Except as otherwise provided by this chapter, specific performance of a contract may be enforced against—

(*a*) either party thereto;

(*b*) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;

(*c*) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;

(*d*) when a public company has entered into a contract and subsequently becomes amalgamated with another public company, the new company which arises out of the amalgamation;

(*e*) when the promoters of a public company have, before its incorporation, entered into a contract, the company: provided that the company has ratified and adopted the contract and the contract is warranted by the terms of the incorporation.

Illustrations

to clause (*b*):—A contracts to convey certain land to B by a particular day. A dies intestate before that day without having conveyed the land. B may compel A's heir or other representative in interest to perform the contract specifically.

A contracts to sell certain land to B for Rs. 5,000. A afterwards conveys the land for Rs. 6,000 to C, who has notice of the original contract. B may enforce specific performance of the contract as against C.

A contracts to sell land to B for Rs. 5,000. B takes possession of the land. Afterwards A sells it to C for Rs. 6,000. C makes no enquiry of B relating to his interest in the land. B's possession is sufficient to affect C with notice of his interest, and he may enforce specific performance of the contract against C.

A contracts, in consideration of Rs. 1,000, to bequeath certain of his lands to B. Immediately after the contract A dies intestate, and C takes out administration to his estate. B may enforce specific performance of the contract against C.

A contracts to sell certain land to B. Before the completion of the contract, A becomes a lunatic and C is appointed his committee. B may specifically enforce the contract against C.

to clause (*c*):—A, the tenant-for-life of an estate, with remainder to B, in due exercise of a power conferred by the settlement under which he is tenant-for-life, contracts to sell the estate to C, who has notice of the settlement. Before the sale is completed, A dies. C may enforce specific performance of the contract against B.

A and B are joint tenants of land, his undivided moiety of which either may alien in his lifetime, but which, subject to that right, devolves on the

survivor. A contracts to sell his moiety to C and dies. C may enforce specific performance of the contract against B.

The proviso by way of exception in the opening words of the section seems intended, by way of precaution, to preserve all defences elsewhere provided upon the contract itself, to those claiming by subsequent title to the original parties to the contract.

Clause (*a*) calls for no special remark. The court in one case refused to assist the plaintiff in a suit for land when it appeared that he had obtained a registered sale-deed comprising the property in question from some of the defendants who had already to his knowledge contracted to sell it to another. The plaintiff had paid no consideration for the sale-deed which, in fact, represented a collusive transaction entered into to defeat the prior contract. (*Namasivayam Pillai* v. *Nelayappa Pillai*, I. L. R. 18 Mad. 43.) Clause (*b*), as its exception shows, applies to, and the five Illustrations to it are all instances of, contracts which are executory agreements. The general principle of this clause and its Illustrations is that from the time of the contract for the sale of the land, the vendor, as to the land, becomes a trustee for the vendee; and the vendee, as to the purchase-money, a trustee for the vendor, who has a lien upon the land therefor. And everyone coming in by subsequent and representative title, and every subsequent purchaser from either with notice, becomes subject to the same equities as the party would be to whom he succeeds, or from whom he purchased. The extent to which the fusion of law and equity in England operates, is shown by what was laid down in *Walsh* v. *Lonsdale* (21 Ch. D. 14) that where there is merely an executory agreement for a lease, there are not now two estates, one at law, by the payment of rent as tenant from year to year, and another in equity, under the agreement, but there is only one court, and the rules of equity prevail. Hence, on the one hand, the tenant holds on the same terms as if he had the lease, and may enforce specific performance; and, on the other hand, the landlord has the same rights as if he had granted the lease. The tenant may insist on notice, and the landlord may exercise the right of distress, just as if the lease had been executed. The maxim of equity at the bottom of it all is that equity regards as done what is agreed to be done. But nothing is looked upon in equity as done, but what ought to be done, not what might have been done. Nor will equity consider things as thus done in favour of everybody, but only in favour of

Clause (*b*).

those who have a right to pray that they might be done. (1 Story's Eq. 789—792.) On this limitation of the maxim, see *In re Anstis.* (31 Ch. D. 596.) Of the Illustrations the first, fourth, and fifth are instances of defendants who have come in by subsequent and representative titles to the original party to the contract; the second and third are in substance the same as Illustrations (*g*) and (*h*) to s. 3; the former being an example of a subsequent purchaser affected by express notice and the latter by constructive notice. Unfortunately neither here nor under s. 3 is there given any example in which a subsequent transferee without notice will be (as clause (*b*) clearly assumes) protected against an equally innocent purchaser under a prior executory agreement. In the absence of any fresh Illustration it seems sufficient to refer back to the remarks already made on this class of cases in treating of the subject of notice. (See *ante*, p. 48.) As to the duty of the vendor to produce a proper abstract of title-deeds under the Conveyancing and Law of Property Act, 1884, see *In re Johnson and Tustin.* (30 Ch. D. 42.)

Clause (*c*).

Clause (*c*). Here the word "defendant" must be taken to mean "the other party to the contract;" for in both the Illustrations to the clause, A is the party who contracts to sell an interest, and thereby, as he is legally enabled to do, displaces a prior existing interest or title in B which, but for the contract by A, would on A's death have been consummated; but A is assumed to have died, and then a suit is supposed to be brought to enforce the contract by A against B, who is really the only essential defendant, though A's representative might, though he need not, be joined as a defendant; but A himself never gets into the position of a defendant; so that there is some inaccuracy in the wording of the clause, though the meaning is clear. The principle here is the same as what governs the preceding clause, namely, that equity regards as done what is agreed to be done. The first Illustration is probably borrowed from the case of *Shannon* v. *Bradstreet* (1 Sch. & L. 52); and there are also cases in accord with the second Illustration, the principle being that the agreement by one joint tenant for the sale of his share severs the joint tenancy in equity, and so prevails against the survivor (Sugden's V. & P. 172); the peculiarity in both instances being that in form the contract is enforced against one who was no party to it; but in substance the title acquired under the contract prevails against that in another which was displaced by it; and this

is how the matter ought strictly to be regarded, rather than as an instance of the specific performance of a contract.

If the agreement or contract by A was defective in any respect, so that specific performance could not have been enforced against A in his lifetime, it cannot prevail against B after A's death. Thus an agreement between husband and wife that the wife should, for valuable consideration, convey landed property to her husband, and he having performed his part, the wife died without having conveyed, but the agreement not having been duly acknowledged under the 3 & 4 W. IV, c. 74, would have been ineffective against the wife, it was held that the agreement was no defence in a suit by the wife's heir against the husband. (*Williams* v. *Walker*, 9 Q. B. D. 581.)

Clauses (*d*) and (*e*) may conveniently be considered together; they are the converse cases to those in clauses (*g*) and (*h*) of s. 23. To a limited extent the present subject has been also considered under clause (*f*) of s. 21; and it must be borne in mind that this latter clause contains a limitation which is applicable to cases falling within the two clauses now to be discussed. Clause (*d*) seems to embody what is generally stated as the result of English decisions on the subject; and the principle of the rule is that the amalgamated company will not be allowed to exercise powers acquired by means of agreements with its component companies, except upon the terms of complying with those agreements, provided they are such as the amalgamated company would itself have been bound by if it had entered into them. (1 Lindley on Part. B, ii, c. 2, s. 2.) The rule generally finds its application in respect to companies with compulsory powers for the execution of public works, and as against such a company it is an obvious equity that having by amalgamation taken the benefits of a prior company, it must also take its burdens. So applied the rule does not conflict with the general principle that a person cannot, without the assent of his contractee, get rid of his own liability by transferring it to another. And what is true of individuals is true of companies, and two companies do not, by amalgamating, become jointly liable for each other's engagements, nor do the shareholders in the one company become debtors to the creditors of the other company. If the agreement to amalgamate is valid, it will bind the two companies as between themselves; but such an agreement will not *per se* give the creditors of either any

locus standi against the other; and if the agreement to amalgamate is *ultra vires* and invalid as between the two companies, securities given by one company in respect of the debts of the other will be invalid also. (Lindley on Part. *ibid.*) In practice no amalgamation of companies exercising compulsory powers takes place except under a special Act, which always regulates the transfer of prior contracts made by the one or the other.

Cases within clause (*e*).

Clause (*e*) also represents the result of several English decisions. At first the rule was laid down in an unqualified manner, that powers given under an Act, as the result of arrangements and terms made previously by the promoters with third persons, could not be exercised except subject to such arrangements and terms. (*Edwards* v. *Grand J. Ry. Co.*, 1 M. & Cr. 650.) But later cases rightly qualified this by the two conditions stated in clause (*e*). With regard to the first condition, that the company must have ratified and adopted the contract, this is justified by the consideration that it is a fallacy to regard the promoters as standing in the position of agents of the company, inasmuch as they cannot be agents of a non-existing body; nor is there any analogy between their position and that of agents: they are merely persons who, for purposes of their own, are desirous of forming a company to execute a certain project. And further, those who become shareholders after the company is formed, do so on the faith of what they find in the Act constituting the company; and cannot therefore be bound by any prior obligations or contracts not recognised by the Act, unless they, as a company, have afterwards ratified and adopted them. (*Shrewsbury* v. *N. S. R. Co.*, L. R. 1 Eq. 614; *Spiller* v. *Paris S. Co.*, 7 Ch. D. 368.) Hence, if promoters have contracted with a person to take some of his land, paying a certain price for it, and afterwards the company does not want to, and does not take or use the land, it cannot be made to do so. (*Preston* v. *L. M. Ry. Co.*, 5 H. L. C. 605.) Accurately speaking, there cannot in law be an effectual ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence. It does not follow from that that acts may not be done by the company after its formation, which make a new contract to the same effect as the old one; but that, rightly viewed, stands on a different principle. (*In re Empress Engineering Co.*, 16 Ch. D. 128.) Hence, a company which took a transfer of a

contract by the promoters for working a patent with a provision for the patentee sharing in the profits, was held bound (this not being an independent sale of the patent), by the ordinary equity as to one who takes property with notice of a contract affecting it. (*Werderman* v. *S. G. d'Electricité*, 19 Ch. D. 246.)

The second condition is still more obviously justifiable; for if promoters cannot be agents of a non-existing company in making contracts within the scope of the projected company, much less can they be so as to contracts that would be *ultra vires* and invalid though made by the company itself when incorporated. Contracts made by promoters to pay sums of money to persons who might lawfully oppose the formation of the company, and in consideration thereof agree not to do so, but to use their influence in its favour, have been held to be *ultra vires* and not enforceable, though in one case the contract had been ratified, and an independent stipulation to take some of the land of the plaintiff had been acted upon. (*Shrewsbury* v. *N. S. Ry. Co.*, L. R. 1 Eq. 593.) In a more typical case the promoters of a railway to a town had agreed with the town authorities, in consideration of their supporting the project, to pay for the making of a quay and harbour; and here the subject-matter of the contract was clearly quite foreign to the objects for which the company was formed. (*Caledonian, &c., Ry. Co.* v. *Helensburgh*, 2 Macqueen, 391.)

(*h*) *Against whom Contracts cannot be specifically enforced.*

What parties cannot be compelled to perform.

28. Specific performance of a contract cannot be enforced against a party thereto in any of the following cases:—

(*a*) if the consideration to be received by him is so grossly inadequate, with reference to the state of things existing at the date of the contract, as to be either by itself or coupled with other circumstances evidence of fraud or of undue advantage taken by the plaintiff;

(*b*) if his assent was obtained by the misrepresentation (whether wilful or innocent), concealment, circumvention or unfair practices, of any party to whom performance would

become due under the contract, or by any promise of such party which has not been substantially fulfilled ;

(*c*) if his assent was given under the influence of mistake of fact, misapprehension or surprise : Provided that, when the contract provides for compensation in case of mistake compensation may be made for a mistake within the scope of such provision, and the contract may be specifically enforced in other respects if proper to be so enforced.

Illustrations

to clause (*c*) :—A, one of two executors, in the erroneous belief that he had the authority of his co-executor, enters into an agreement for the sale to B of his testator's property. B cannot insist on the sale being completed.

A directs an auctioneer to sell certain land. A afterwards revokes the auctioneer's authority as to 20 bighas of this land, but the auctioneer inadvertently sells the whole to B, who has not notice of the revocation. B cannot enforce specific performance of the agreement.

General scope of the section.

The main distinction between this section and s. 26 is that here the defence goes to the whole contract : this is most apparent in relation to clauses (*b*) and *c*). On the other hand, though the grounds of objection set forth in this section affect the contract as a whole and avail to prevent its enforcement, they are available only by way of defence ; if the same party seeks actively to set aside his contract, he must proceed under ch. iv. ; and the grounds of objection there available for attack are not the same as those here available for defence. As s. 26 provides for the rectification of a contract by way of defence, and ch. iii for its rectification actively by a plaintiff, so this section provides for its avoidance by way of defence, and ch. iv for its avoidance actively by a plaintiff. Further, cases within this section must be distinguished from the cases falling within s. 22, ii, the scope of which I have already stated. Here as to cases within clauses (*a*) and (*b*), the distinguishing feature is the presence of fraud or other faulty conduct on the part of the plaintiff ; and in cases within clause (*c*), though there may be no misconduct by the plaintiff, yet the defendant is not limited to a plea of mere want of caution or foresight on his part, but may rely on something more than that, namely, some mistake or misapprehension of fact or

surprise; and this last at least will generally involve fault on the part of the plaintiff. This section mentions the persons against whom specific performance cannot be decreed, and a minor is not mentioned as one of them. Though s. 11 of the Indian Contract Act says that a minor is not competent to enter into contracts, this does not exclude the power of a guardian of a minor to represent him and enter into contracts on his behalf. A contract entered into by a minor is merely voidable by him, and this principle is not affected by s. 11 of the Indian Contract Act. (*Mahamed Arif* v. *Saraswati Debya*, I. L. R 18 Cal. 259; *Krishnasami* v. *Sundorappayar*, I. L. R. 18 Mad. 415.) In *Fatima Bibi* v. *Debnauth Shah* (I. L. R. 20 Cal 408) the Calcutta Court held that a minor could not claim specific performance of a contract because there is no mutuality. The Madras Judges, in the above-noted case, were of opinion that that decision was wrong, on the ground that the doctrine of mutuality has no application in this country.

Clause (*a*). Inadequacy of consideration.

Clause (*a*).—Inadequacy of consideration as a ground of defence calls for the exercise of much discretion in a decision upon it. The defence is one that may be used either by the seller or the buyer; the seller may show that the estate or other subject-matter is vastly more valuable than the price agreed upon, or the buyer that the price he has got to pay is altogether in excess of the intrinsic value of the property. But mere inadequacy is never enough; for the value of a thing is what it will produce, and admits of no precise standard, but fluctuates with varying circumstances, and a man may at one time be eager to sell for less than he would at another time. The pressure under which he acted may have been in no way due to the other party, who may not have sought the contract, and whose only inducement at that time may have been this very inequality of value. (1 Story's Eq. 245.) Hence, it is so essential to regard only the state of things at the date of the contract, and not to decide by the light of subsequent events. The gross inequality that by itself evidences fraud or undue advantage must be enough to render the bargain such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; such, as it is said, as shocks the conscience of an honest man. (1 Story's Eq. 244, 246.) Ordinarily, inadequacy will be found coupled with other

circumstances that tend directly to the same conclusion of fraud or undue advantage; but if these are absent, and the inadequacy so far stands by itself, it will have to be noted whether there is not also an absence of countervailing circumstances tending to explain or palliate the grossness of the inadequacy. Lastly, it is not essential that fraud as legally defined should be strictly proved; it is enough to show that an undue advantage has been taken. It has, I think, been well said that an undue advantage is taken of the party under circumstances which mislead, confuse, or disturb the just result of his judgment, and thus expose him to be the victim of the artful, the importunate, and the cunning. For instance, if proper time is not allowed to the party, and he acts improvidently; if he is importunately pressed; if those in whom he places confidence make use of strong persuasions; if he is not fully aware of the consequences, but is suddenly drawn in to act; if he is not permitted to consult disinterested friends or counsel, before he is called upon to act, in circumstances of sudden emergency or unexpected right or acquisition; in these and many like cases, if there has been great inequality in the bargain, it will constitute a defence on the ground of fraud, imposition, or unconscionable advantage. (1 Story's Eq. 251.) A case that went far to establish the proposition that mere inadequacy of price is sufficient reason to refuse specific performance of a contract is *Falcke* v. *Gray* (5 Jur. N. S. 645). There plaintiff in looking over a house saw a pair of rare China vases; when he afterwards agreed to take the house, he agreed to buy at a valuation some articles of furniture and these two vases, which were then valued for the defendant at £40, whereas they were really worth at least £200, which sum another dealer afterwards gave defendant for them. Plaintiff sought to enforce specific performance of the agreement, but it was refused, though the plaintiff had cautiously said and done nothing to misrepresent the true value; but the fact that plaintiff was himself a dealer in such things, and the defendant was a lady ignorant of their true value, and her agent who valued them for her stated at the time that he was not competent to value them, was held sufficient as showing that, while the purpose of the parties was to deal for a fair price, the plaintiff stood by knowing that the price named was wholly unfair. It is rather a strong case, but a good illustration for this clause. (See also Sugden's V. & P. 230, 233.)

Clause (*b*).—Here we have much the same ingredients for a defence as are stated in s. 26, clauses (*a*) and (*c*); but the distinction is that the defence goes to the whole contract, and not to a part only by way of variation. As was stated in regard to s. 24, there is here no intrinsic defect in the contract itself (such as would bring it, for instance, under s. 21) which renders it incapable of or unfit for specific performance; for, putting aside the personal conduct of the parties, the contract itself may, it is assumed, be one very proper to be specifically enforced; but as under s. 24 there is some defect in the conduct of the plaintiff in relation to the contract, which operates as a personal bar to his enforcing it, so here there is a ground of defence purely personal to the defendant, namely, that his assent to an otherwise proper contract was improperly obtained by conduct extraneous to the contract, on which he is entitled to rely. Thus viewed the clause is a very wide one, including all cases in which assent has been wrongfully obtained so as to render the contract voidable. The promise spoken of at the end of the clause is not, I apprehend, one comprised in the contract, for a case of that kind would fall under s. 24, clause (*b*), but some extraneous though contemporaneous promise, such as is mentioned in clause (*c*) of s. 26, but here operating as a defence to the whole contract.

Clause (*b*) how distinguished from other sections.

Misrepresentation is a word defined by s. 18, Indian Contract Act, and by the interpretation clause of this Act, must, therefore, be taken in the sense there defined. If misrepresentation is a ground of defence, it follows that much more is fraud, as defined by s. 17, Indian Contract Act, also a defence. But it is noteworthy that the word "fraud" is not used in this clause, but the general and untechnical words "concealment, circumvention or unfair practices" are employed. This, I presume, was with the view of including acts which, in the ordinary sense of the word, would be rightly viewed as unfair practices and yet might not be precisely within the technical definition of fraud. Further, assent obtained by what is technically called "coercion," or "undue influence," is also thus brought within the scope of the clause. Part of the definition of fraud is the active concealment of a fact; and here concealment must be taken with this limitation, for a person is not liable for the passive con-

Misrepresentation and other words defined.

cealment of what he is not bound to divulge. As the Explanation to s. 17, Indian Contract Act, puts it, to make mere silence fraudulent, it must be the duty of the person keeping silence to speak, or his silence must in these circumstances be in itself equivalent to speech. These matters are all parts of the general law of contract, and cannot here be fully treated; but one example of concealment operating as a defence to specific performance is peculiar enough to deserve mention. It was there laid down that if a man knows that he has committed a trespass of a very serious character upon his neighbour's property, and finding it convenient to screen himself from the consequences, makes a proposal for the purchase of that property, he certainly ought to communicate to the person with whom he is dealing the exact state of the circumstances of the case. For his proposal to buy the property involves a buying-up of rights which the owner has acquired against him, and of which he is not aware, and he must, therefore, disclose the act giving rise to those rights. (*Phillips* v. *Homfray*, L. R. 6 Ch. 779.) Again, circumvention may be fairly explained by another part of the definition of fraud as "any act fitted to deceive." I should also regard the obtaining an assent by the use of undue influence as circumvention. "Unfair practices" is a still more sweeping phrase.

Innocent misrepresentation.

It should be noticed that by the definition in s. 18, Indian Contract Act, it is expressly assumed that a misrepresentation may be "without an intent to deceive," and be "caused innocently;" and when it is said in this clause that it is immaterial whether the misrepresentation be wilful or innocent, the object is to include a case where the misrepresentation, though real and operating upon the assent to the contract, was yet innocent and not wilful, in that it was the result of a pure misunderstanding or mere forgetfulness; for then, as the assent to the contract was obtained in fact by means of it, the other party is none the less deceived, though it was done innocently, and is entitled to be absolved, though the plaintiff offers to take the contract as affected by the misrepresentation; for a party obtaining an agreement by a partial misrepresentation, however unintentional, is not entitled to specific performance on waiving the part affected by misrepresentation. The effect of partial misrepresentation is not to alter or modify the agreement *pro tanto*, but to destroy it entirely, and to operate as a personal bar to the party who has practised it.

(*Clemont* v. *Yasburg*, 1 J. & W. 112; *Bascomb* v. *Beckwith*, L. R. 8 Eq. 100; *Smith* v. *Chadwick*, 20 Ch. D. 44.) Misdescription may entitle a person to rescind a contract although there is a clause for compensation. (*Fawcett* v. *Holmes*, 42 Ch. D. 150.) As to the measure of compensation where there is a special agreement for compensation in case of misdescription see *Chifferiel* v. *Watson*. (40 Ch. D. 45.)

When premises are sold for business premises, and there is a concealment of restrictive covenants, on the part of the vendor, as to the kinds of business allowable, specific performance would be refused. *In re Davis* and *Casey*. (40 Ch. D. 601.)

The assent must have been thus induced.

Clause (*b*) assumes that the assent was obtained by the misconduct of the plaintiff; for here the principle laid down in the Explanation to s. 19, Indian Contract Act, applies, that a fraud or misrepresentation which did not cause the consent to a contract of the party, on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable. In other words, if a man really acts on his own investigations and knowledge, and not on what the other party told him, he is not deceived thereby, for he did not give his assent on that account. (*Small* v. *Attwood*, 6 Cl. & F. 232.) On much the same ground we must apply to this clause the Exception in s. 19, Indian Contract Act; for a representation as to a state of facts which is palpably false does not deceive, and, therefore, an assent cannot be said to have been obtained by means of it: as where a purchaser sees a house to be without roof or windows, and it is described as in perfect repair. In English cases it has been said that, where there has been any misrepresentation, to avoid the defence it must be shown very clearly that the purchaser had actual knowledge that it was untrue (*Price* v. *Macaulay*, 2 De G. M. & G. 346); but the Exception to s. 19, Indian Contract Act, will be satisfied if it be shown that the party whose assent was obtained by it "had the means of discovering the truth with ordinary diligence." This is, I conceive, a practically better rule; and as misrepresentation is a word defined by s. 18, Indian Contract Act, and this Exception qualifies and limits its application, our courts would, I consider, be bound to apply the Exception in acting under clause (*b*). But where there is not evidence either that the defendant knew facts to show that the statement was untrue, or that he said or did anything to show that he did not actually rely upon the statement, the inference remains that he did so

rely, and the statement being a material one, its being untrue is a sufficient ground of defence or for rescinding the contract. (*Redgrave* v. *Hurd*, 20 Ch. D. 22.) A misrepresentation that an intended tenant was "a desirable tenant," when as a matter of fact he was in arrears with his rent, was held to be sufficient for rescinding the contract. And though there had been a partial enquiry by the agent of the purchaser, but the fact of the tenant being in arrears with his rent had not been discovered, it was held to be a sufficient defence, and that it must be assumed that the misrepresentation induced the purchaser to contract. (*Smith* v. *Land, etc., Corporation*, 28 Ch. D. 7.)

If a statement would naturally act as an inducement, it must be taken that it did so act; but it may then be shown that in fact it did not so act. If a statement is ambiguous, the other party is bound to show what meaning he put on it, and that this meaning deceived him. A false statement as to the contents of a document, though it is referred to in the particulars of sale as to be seen, will be enough: but an incomplete statement, altogether true but imperfect, is not s for it was the other party's fault then not to have looked at the document. (*Smith* v. *Chadwick*, 20 Ch. D. 45, 57.) This case was affirmed in appeal. (9 Ap. Cas. 187, 201.) The House of Lords held that if a statement is ambiguous and capable of two meanings, it lies on the plaintiff to prove that he had interpreted the words in the sense in which they were false, and that he had in fact been deceived by them into taking shares. This the plaintiff had not proved. Lord Bramwell thought the statement capable of only one sense, and that false, and that plaintiff had so understood it, but that the statement was not fraudulent on the part of the defendant, and so plaintiff's case was not made out.

Misconduct must be that of the other party.

Lastly, it is to be noted that the misconduct operating as a defence under clause (*b*) must be that "of any party to whom performance would become due under the contract." This will of course include an agent who may have been employed by the party in conducting the transaction, but exclude a stranger or other unauthorised person making statements.

In *Mullens* v. *Miller* (22 Ch. D. 194—Bacon, V. C.) an agent employed to find a purchaser made misrepresentations as to the value of the property and as to offers from others to buy it, it was held to be within the scope of his authority and a good defence to specific

performance. In such a case the principal must be taken to authorize his agent in finding a purchaser to describe truly the property and to state any fact or circumstance which may relate to its value; and hence a false statement by such agent concludes the principal. If the plaintiff is an assignee, and not the original party to the contract, the defence is still available, though the plaintiff is personally free from all blame. In the converse case, where B has a good defence under this clause against A, but assigns the contract to C, on whom no deceit is practised, and who is not affected by the original misrepresentation, it has been held that A may enforce the contract against C, though he could not have done so against B. (*Smith* v. *Clarke*, 12 Ves. 477, 484.)

Clause (*c*); its scope.

Clause (*c*).—This is also distinguishable from s. 26, as it is a defence going to the whole suit, subject only to any proviso for compensation expressed in the contract in case of mistake. But a case within the proviso would not fall within within s. 14 or s. 15; the mistake of fact thus provided for is generally one as to quantity, and so comes near to Illustration (*a*) to s. 14; but yet there may be no failure of any part of the contract: thus, on a sale of estate A, described by boundaries, and as containing 1,000 acres, more or less, with a proviso for compensation for any mistake of quantity, no part of the contract fails if estate A as a whole is conveyed, though the extent turns out to be 950 acres only; but then the proviso applies to the deficiency of 50 acres, which must be compensated for. Under such a condition it will make no difference that the deficiency is not discovered till after the conveyance is completed; thus, in one case there was a deficiency in the quantity of land, and in another in the amount of the rental, and in each, though the transaction had been completed by a conveyance, compensation was allowed. (*In re Turner and Skelton*, 13 Ch. D. 130; *Bos* v. *Helsham*, L. R. 2 Ex. 72.) The case of *Manson* v. *Thacker* (7 Ch. D. 620), decided the other way must be taken to be bad law; and though in a later case (*Allen* v. *Richardson*, 13 Ch. D. 524) the V. C. maintained the correctness of his former decision, there was in that case no such condition, and so the question never arose; for it is, of course, a true principle that "if the conveyance has been actually executed by all the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase-money either at law or in equity." To such a case the maxim of *caveat emptor* applies, and this last case was of that kind.

In *Joliffe* v. *Baker* (11 Q. B. D. 255), there was a conveyance of two parcels of land described by metes and bounds and the description of quantity was 3 acres "or thereabouts;" there was no proviso for compensation in case of discrepancies, and it was found that there had been no fraud (either legal or moral, though as to that, it was said that there was no real distinction), and it was consequently held that the purchaser was too late in coming, after conveyance, for compensation as to the quantity. There seems to have been ample ground for the decision of the case, but the cases cited were commented on and an opinion in favour of the view of Malins, V. C., was expressed on the ground "that the jurisdiction under which compensation was granted was exercised only as ancillary to specific performance, and was never exercised independently" (p. 267). The clause for compensation does not seem to have been regarded as material after conveyance. In this state of the authorities, till the point has been decided in a court of appeal, the law must be said to be doubtful. In *Palmer* v. *Johnson* (12 Q. B. D. 32) the preceding case was distinguished by one of the same Judges on the ground that there was no clause for compensation. In *Palmer* v. *Johnson* there was such a clause; the error was as to the rental, and though there had been a conveyance without any covenant, it was held that the contract for compensation in the preliminary agreement was standing, and so compensation was given. In this case, *In re Turner and Skelton and Bos* v. *Helsham* were followed, and *Allen* v. *Richardson* was disapproved of. It was affirmed in appeal in 13 Q. B. D. 351. It is a question of construction whether the agreement for compensation is merged in the subsequent deed of conveyance; that is a question of intention, and the authority of prior decisions shows that such a condition may very well survive and be separate from the conveyance which does not necessarily cover all the ground covered by the prior contract of purchase. A representation that a property is held under a lease, when in fact is held by an under-lease, is a fatal misdescription. A condition for compensation for "error in the description of the property" means a misdescription of the *corporeal* property, not a mistake in the description of the vendor's title. (*In re Beyfus and M.'s contract*, 39 Ch. D. 110). Compensation was awarded in one case where there had been a sale with a misdescription that the roads were kerbed. (*Tomlin* v. *Luce*, 41 Ch. D. 573, *s. c. on app.*, 43 Ch. D. 191.)

The Illustrations considered.

With regard to both the Illustrations to this clause, there is this peculiarity to be noticed, that they are examples of cases in which the plaintiff is entirely free from all fault, and the defendant, by his own mistake or carelessness, has led the plaintiff to make with him the contract which, so far as the plaintiff could judge, he was fully competent to make. The first Illustration is taken from the case of *Sneesby* v. *Thorne* (7 D. M. & G. 399), and by English law as well as under s. 271 of the Indian Succession Act, the executor was competent, if he liked, to have made the sale alone, and though he was acting on the assumption that he had the authority of his co-executor, the plaintiff had no knowledge of his mistake. The second Illustration is from the case of *Manser* v. *Back* (6 Hare, 443), and, like the other, is a case in which the defendant was not without any power or authority to make the contract he assumed to do (when of course there would have been no contract at all), but he mistook the extent of his power or authority. By s. 208, Indian Contract Act, the revocation of an agent's authority does not take effect, so far as regards third persons, before it becomes known to them. In *Manser* v. *Back*, on a sale of land by auction, there were certain printed conditions, but afterwards a right of way to other land of the vendor was reserved, and some of the printed copies were, before the sale, altered in ink. This was not brought to the notice of the purchaser, and the auctioneer, by mistake, signed a copy of the conditions without the reservation. The purchaser was let into possession, and sued for a conveyance free from the reservation, but this was refused. Such a case would thus not fall within clause (*a*) of s. 26, but is an apt example of clause (*c*) of s. 28. A mistake may thus be used by a vendor or a purchaser as a defence, when he could not seek to enforce the contract in accordance with his mistake, as then the evidence to prove the additional term would be inadmissible. (*Fairhead* v. *Southee*, 9 Jur. N. S. 764.) As between a purchaser and an unauthorised agent, the liability of the latter is quite another matter. (*Collen* v. *Wright*, 8 E. & B. 647). The reverse of the condition in the proviso is a not unfrequent condition of sale, namely, that an error in the particulars shall not annul the sale, nor be the subject of compensation ; but this will only be applied to small errors and will not bar compensation for a material deficiency. (*Whittemore* v. *Whittemore*, L. R. 8 Eq. 603; *In re Percy and White*, 32 Ch. D. 14. See *also note*, 2 L. Q. Rev. 414.)

The terms of clause (*c*).

This clause differs from the preceding one in that it assumes that the assent was not "obtained" by any act or conduct on the part of the plaintiff, but was "given" under the influence of one or other of three causes in respect to which the plaintiff was personally passive, but which, as to the defendant personally, was the operative motive to his assent. Further, a condition in the contract for compensation in case of mistake, as contemplated by the proviso in this clause, will not limit the purchaser to such compensation only as is expressly embraced by the terms of the condition; but his right to compensation under it will generally be cumulative to his ordinary right to performance with compensation, as under s. 14 or s. 19 (Fry on S. P. 543). Similarly, where the purchaser would, upon the contract as a whole, have a good defence otherwise, as under s. 15, such a condition does not operate to abrogate such defence. Much more, a vendor cannot avail himself of such a condition for compensation (nor indeed of any condition of sale), where there has been fraud or misrepresentation on his part in respect to the subject-matter of such condition. (*Brownlie* v. *Campbell*, 5 Ap. Cas. 937.) The first cause, "mistake of fact," though not defined, is yet treated of in ss. 20 to 22, Indian Contract Act, and the language of those sections must be borne in mind; and in applying the phrase as a defence under this clause, it must be understood and used consistently with those sections. Thus, I apprehend, a mistake of fact, even as a defence, must be "as to a matter of fact essential to the agreement." Again, s. 22, Indian Contract Act, provides that a contract is not voidable when the mistake of fact is only unilateral, that is, is that of one party only. But this clause assumes that the defendant may have been the only party who was under a mistake of fact in giving his assent. Thus the use of a mistake of fact, as a mere defence to a suit for specific performance, is very distinguishable from the use of it by a plaintiff under either ch. iii or ch. iv. There, to be available, the mistake of fact must have been mutual. Hence it follows that though under this clause, as a decree for specific performance is always a matter for the discretion of the court, it will not be made where it would be inequitable to enforce specific performance against a defendant who has acted under a mistake of fact; yet as the contract itself is not therefore voidable, the innocent plaintiff is not to be left without remedy, but the court should, in substitution of specific

Mistake of fact, what.

performance, give him appropriate compensation for non-performance of the contract. (*Tamplin* v. *James*, 15 Ch. D. 222; s. 19, par. 2.) This is the practice of the English courts of equity in cases of mistake within this clause, and our courts should further adopt the principle on which those courts act, that it is not enough that the defendant swears that he was under a mistake, if in the circumstances no man with his senses about him would have made it. There must be something that might reasonably have led to the mistake, and one made recklessly or negligently is not enough. Thus, where the plans and descriptions of the lots were perfectly clear, but the defendant, acting carelessly on his own fancied knowledge of the matter, bought under the mistake that some land at the back of the lot, and which had been occupied with it, formed part of it, this was held not to justify the refusal of specific performance of the purchase. (*Tamplin* v. *James*, 15 Ch. D. 215.) It is otherwise where the plans, descriptions or conditions of sale, though not erroneous, are so framed as to be misleading without special care or knowledge, for then the mistake is one to which the plaintiff has by his acts, however unintentionally, contributed; and the defendant may rely on the mistake as a defence, though he may also have some other totally distinct reason for wishing to escape from his bargain. (*Denny* v. *Hancock*, L. R. 6 Ch. 1; *Baskcomb* v. *Beckwith*, L. R. 8 Eq. 100.)

In *Bremer* v. *Brown* (28 Ch. D. 314), the court followed *Denny* v. *Hancock* though there was a clause for "compensation in case of misdescription." For other instances of cases on misleading particulars of sale see *Farebrother* v. *Gibson* (1 D. & J. 602), and *Leyland* v. *Illingworth* (2 D. F. and J. 248). In *Andrew* v. *Aitken* (22 Ch. D. 218), where plaintiff's solicitors had made a misrepresentation that a certain deed contained no unusually restrictive covenant, and as a fact there was a covenant (held to be unusually restrictive), that the tenant should at any time (and not within a limited time as is usual) build any additional house as security for the ground-rent, this was held a sufficient defence to a suit for specific performance; and a counter-claim for rescission on this ground was allowed. Any stipulation inserted in a contract for the purpose of limiting the period for which a title shall be shown must give a perfectly fair description of the nature which is to form the root of the title; an omission to state that the deed to be taken as the root of title was a voluntary deed is therefore fatal (*In re Marsh and Earl of Granville*, 24 Ch. D. 11).

Where the conditions were that the sale was subject to any existing rights and easements, and there was an easement known to the vendor, but as to which the auctioneer made a misleading statement, specific performance was refused. (*Heywood* v. *Mallahiew*, 25 Ch. D. 357; *Dunn* v. *Flood*, 25 Ch. D. 629.) In English treatises on Equity the subject of mistake as a ground of relief is discussed as a whole in all its forms of application; but in this Act the occasions for its use are necessarily taken separately, as in s. 26, s. 28, and again more largely in chapters iii and iv. There are but few cases that are strictly examples of the use of mistake as a mere ground of defence in the manner contemplated by this clause; but almost all the cases (and they are both numerous and conflicting) illustrate the use of mistake as a ground for the rectification or rescission of contracts. It will be convenient, therefore, to consider the subject more at large hereafter, remembering only that mistake is more largely available under this clause as a defence than it is as a ground of attack.

Misapprehension, what.

The next term, "misapprehension," must be taken in its ordinary and popular sense; it is not qualified by being limited to a misapprehension of fact, but I do not consider that it can be made to include a misapprehension of law. By s. 21, Indian Contract Act, a mistake of law is expressly excluded as a ground for making a contract voidable; and such, indeed, stated broadly, is the recognized rule in every system of law, though, as we shall see, the real conflict has been in those cases which lie in the border-land between mistake of law and mistake of fact. But I regard misapprehension here as limited to facts though it may not be easy to give any very marked distinction between mistake and misapprehension of fact. Perhaps the latter term was added to prevent the defence under this clause being limited to what is a technical phrase, "mistake of fact," as described in the Indian Contract Act. But there is also this difference, that there is a mistake of fact when a person erroneously believes in the existence or otherwise of a particular fact, or set of facts; that is, when he is actuated by an imperfect knowledge of facts; but when he knows all the facts as they really exist, but misconceives their bearing or relation to one another, or the consequences (other than mere legal ones) that necessarily flow from them, he may be said to act under a misapprehension

How distinguished from mistake.

of fact. It is obvious that an assent given under the influence of either the one or the other source of error might, with equal equity, be used as a just ground of defence to the extent at least of resisting specific performance. Lastly, I would notice that there is here no qualification as to the reasonableness of the misapprehension as in s. 26, clause (*b*), the bearing of which has been already considered.

Surprise, what.

The third term, "surprise," we have already had occasion to describe (*ante*, p. 165), and it is obvious that it is not coincident with, though it may more or less include, either mistake or misapprehension of fact; but at the same time, like them, it does not necessarily involve any *quasi*-fraudulent conduct on the part of the plaintiff such as forms the ground of defence under clause (*b*).

When these are available.

Lastly, each of these three terms, mistake of fact, misapprehension and surprise, as above explained, is, it must be noted, available only when the defendant's assent has been given under the influence of one or other of them, and then only by way of defence and not of attack, and, as a defence, will not necessarily operate further than to prevent the particular form of relief by specific performance.

(i) *The effect of Dismissing a Suit for Specific Performance.*

Bar of suit for breach after dismissal.

29. The dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract or part, as the case may be.

It has already been noticed under s. 19 that this section, though varying from English practice, is a necessary result of the constitution of our courts in India, where the court, once properly seized of the subject-matter of litigation, is competent, and therefore bound, to dispose of it in its entirety once for all.

(j) *Awards and Directions to execute Settlements.*

Application of preceding sections to awards and testamentary directions to execute settlement. Awards, Specific performance of.

30. The provisions of this chapter as to contracts shall, *mutatis mutandis*, apply to awards and to directions in a will or codicil to execute a particular settlement.

It was old practice in English equity that a bill would lie to enforce specific performance of an award, when the thing ordered by the award to be done was such as a court of equity would specifically enforce, if it had been agreed upon by the parties themselves. For, as by the submission the parties have contracted to do what the arbitrator shall direct when the latter has made his decision, the award is considered in equity as amounting to an agreement by the parties on the terms pointed out by him, and so, as fit to be enforced against a party as a party's own agreement. (Russell on Arb. Part iii, c. 4). Hence, the acts to be done under the award must, in their nature, be such as the court would enforce if found in an ordinary agreement. So also, directions in an award to do an illegal act cannot be enforced; but short of this, it must be remembered, that as the arbitrator is the judge whom the parties themselves have chosen, mere hardship or unreasonableness in the award itself would not be enough to stay the court from acting; though the court will have regard to hardship or unfairness contained in or inducing to the agreement to refer to arbitration, and where that is apparent, will decline (as in an ordinary case) to enforce the award founded on it. Further, the award in respect to the matters it decides, may either go beyond or fall short of the agreement to refer; and in either case there is ground to refuse to enforce it; in the former because the arbitrator having gone beyond his authority, there is more decided than what the parties agreed to, and so no contract between them; and in the latter because there is less, and the parties agreed to be bound by a decision upon all, and not upon some only of the matters referred by them. (*Nickels* v. *Hancock*, 7 D. M. & G. 300). Subject to these qualifications, an award duly rendered is in truth the contract of the parties, and as such is properly the subject-matter for a decree for specific performance.

In England, as in India, arbitration has been regulated by special enactments. The Code of Civil Procedure, Part v, c. 37, deals with three kinds of awards. (1) Where in the course of a pending suit, there has been a reference to arbitration through the court, and the same has been directed by, and an award rendered to, the court. (2) Where, apart from any existing suit, there has been an agreement between parties to refer any difference between them to arbitration, any of them may file it, thus practically turn it into a suit, and then a reference and an award will be founded on it. English equity courts do indeed decline directly to enforce agreements to refer disputes to arbitration, even when disputes, such as were contemplated, have already arisen; but, as we have already seen (*ante*, p. 157), they have the means of often indirectly compelling a plaintiff specifically to perform the contract to refer to arbitration. (Fry on S. P. 662). The result of s. 28, Indian Contract Act, as amended by this Act (*ante*, p. 159), is that as to disputes already existing, such agreements may be enforced; and these are, I apprehend, the only kind of agreements to refer contemplated by the Code of Civil Procedure as enforceable under s. 523. (3) Where not only the agreement to submit, but the award founded on it has been made apart from any suit, any party thereto may file it in the proper court as a suit, and proceed to obtain a decree upon it; and then the only grounds of objection allowed to the award are those specified in ss. 520, 521, namely, in respect to the award itself, that it is either defective in not deciding all, or excessive in deciding more than the matters referred, that it is too uncertain to be executed, or that there is a defect of legality upon the face of it; and in respect to the arbitrator, that he has been guilty of corruption or misconduct; and in respect to either party, that he has been guilty of fraudulent concealment or of wilful deceit towards the arbitrator. These are also the grounds of objection available in respect to the first and second kinds of awards, and in substance these accord with, and are nearly the only objections available in, English courts.

Three kinds of awards. First kind.

Second kind.

Third kind.

The first ground of objection to the award itself has been partly noticed above; in practice it has given rise to numerous decisions, and is by no means so simple as it seems. It involves the construction firstly of the agreement to refer, as to what matters it was the intention

Grounds of objection to awards. Excess or defect in award.

of the parties to submit; and secondly, of the award, as to how far it falls short of, or goes beyond, that intention. In relation to the agreement the award must be a final decision; and it is not so if a matter referred is left undecided, and this though the arbitrator expressly excepts out of the award one matter which, he says, he purposely leaves for litigation; and so if he decides as between the plaintiff and one defendant, and expressly leaves claims between co-defendants undecided or unaffected by the award, for the award, must decide respecting all parties as well as on all matters. So the award may err in holding certain matters not to be matters in difference. But it is enough to award a gross sum in respect of matters in difference without specifically apportioning them. The arbitrator must decide the very questions submitted to him, and not merely settle the case by some general arrangement which he considers fair. An award that directs that one party shall do one thing, and the other party shall thereupon do another, is good and final, but not one that directs that on condition of one party doing a thing (leaving it to his option to do it or not), the other shall do another thing. So a proviso that on the happening of a certain event the award shall not take effect, is not a final decision. But an award in the alternative to do one of two things is sufficiently certain and final. The arbitrator cannot in his award reserve either to himself, or delegate to another, the power of deciding in future respecting certain of the matters submitted, for he is bound to decide all finally, and to do so himself; but as to acts that are not *judicial* but purely *ministerial*, he may reserve or delegate the disposal, as to ascertain the extent of land which he awards at a certain rate per acre. (Russell on Arb., Part ii, c. v, s. 4.)

Want of certainty in award.

The next essential is that the award must be definite or certain, so that it may be executed, and so that no reasonable doubt can arise upon the face of it as to the arbitrator's meaning, or as to the nature and extent of the duties imposed by it on the parties. Still it is to be construed by no technical rules, but fairly and liberally, so as to support it as far as a sensible and reasonable interpretation will allow. Thus, as to time, though none be mentioned, yet it will be inferred that the act is to be done upon request or in a reasonable time, according to the nature of the case. So also as to an amount awarded generally it will need to be specified, but it will be enough if there be data stated from which to ascertain it by a simple calculation,

so that it does not leave it a matter of dispute. Again, if security be directed to be given, its nature and extent should be specified. So in giving directions where acts have to be done, vague and general terms, such as "using all proper and reasonable precautions," or "the ordinary and most approved process," are too uncertain; so to direct a drain to be made of sufficient depth to carry off the water intended to flow down it, without giving the precise dimensions, or specifying what water was to go down it, is too indefinite. Sometimes what is directed in excess of the arbitrator's power may be severable, and the rest of the award may stand; but a direction, though within the power, if bad for uncertainty, will vitiate the whole award. It is the same as to the parties: a direction not saying which of two (whether plaintiffs or defendants) is to do the act is too indefinite. A direction to do an act in its nature impossible is necessarily void: and an award that is unintelligible or inconsistent is rightly held to be too indefinite for execution. Thus an award finding that defendant was not guilty of fraud, and yet concluding against him as if he had been, is manifestly inconsistent and repugnant; but this is not to extend to mere unreasonableness, for the court may think the conclusion not a reasonable one, but it is no ground to interfere, for the arbitrator is the parties' own judge. (Russell, *ibid*, c. v, ss. 4, 6 & 7, and c. viii, s. 2.)

Defect or legality in award.

The third ground, that of an objection to the legality of the award, has led to much conflict of decision. It is now settled that the illegality alleged must be one apparent on the face of the award. But by illegality, it is not meant that there is a direction to do an illegal act, for that of course is void; but that the decision is contrary to law, or, in other words, that the arbitrator has made a mistake of law, which is apparent upon the face of the award. The difficulty is that the arbitrator being the chosen judge of the parties, he must be taken to be the proper judge of the law, as well as of the facts involved in the case. Further, in a general reference of all matters in dispute between the parties, he is not bound to award on mere dry principles of law, but may do so according to the principles of equity and good conscience. (*Knox* v. *Symmonds*, 1 Ves. Jr. 369.) It seems, then, that his decision upon a doubtful point of law, or in a case where the question of law itself is designedly left to his judgment, and where all that can be said is that there has been a simple error of judgment in applying the law to the case, will generally be held to be conclusive. But if it be

apparent that, intending to decide strictly according to law, he has made a gross and palpable mistake of law, or if he himself admits that he erred as to the principle of law affecting the result of the award, it will be sufficient to set it aside or to refer it back to him. (*Dinn* v. *Blake*, L. R. 10 C. P. 388; *In re Dare Hy. Co.*, L. R. 6 Eq. 429.) In *Hutcheson* v. *Eaton* (13. Q. B. D. 867), a distinction is taken between an arbitrator deciding something not within his jurisdiction, when the award is a nullity, and deciding something within his jurisdiction, but wrongly, when it would stand. The Judges differed as to whether the finding the existence of a certain custom and reading it into a contract, and so giving an award on the contract was, or was not, a matter within the jurisdiction of arbitrators. With regard to a mistake of fact, nothing is said in s. 520 or s. 521, but the result of the cases seems to be that to afford ground for interference, the mistake must be no mere error of judgment, but such as to indicate misconduct, in the shape of gross negligence, on the part of the arbitrator, as where there is a mistake in computation, or in a date, material to the rights of the parties, or by the use of false measures or weights or in some similar mode. (2 Story's Eq. 1453—1456*a*; Russell on Arb., Part ii, c. v, s. 8.) Where two parties signed a general reference to arbitrators to decide between them upon their respective rights (they being two widows, and the question arising as to the chastity of the younger one during the husband's life, as maintenance only was given her) and on the face of the award it appeared that the arbitrators had enquired into the matters referred, and no ground appeared for saying that they had misconducted themselves or made any mistake in conducting the enquiry, it was held that the award was binding. The court below had held that the arbitrators had exceeded their authority in enquiring into the question of chastity. But the reference had raised the entire question not merely whether she was entitled to maintenance, but whether there were facts which would disentitle her to succeed to any portion of the estate of her husband. The arbitrators, in substance, found that she had been unchaste, and that was why she had had only a maintenance allowance, and that was all they would give her though they raised or fixed the amount. (*Rani Bhagoti* v. *Rani Chandan*, 12 Ind. Ap. 67.)

Supposing an award to be bad in part on the score of any of the above grounds of objection, or otherwise unfit for specific performance, the next question in a suit for specific performance of it will be

whether such portion is yet so clearly separable in its nature or capable of compensation, as that the award may be good or enforceable for the residue. This is very similar to the question in the case of a simple contract, where part of it is unfit for, or becomes incapable of performance, how far this affects the specific performance of the remainder. (See ss. 13—16, s. 19, Expl.)

In respect to awards there is always a difficulty (analogous to that in some contracts) in separating the good part from the bad. The arbitrator probably frames one part of the award with a view to the other, and each may be varied by the view which he takes of the whole; for it must often happen that a direction perfectly separable as far as the grammatical construction of the award is concerned, is the ground on which the arbitrator has proceeded in making some equivalent provision affecting the other party. Still the experience of numerous cases proves that the court may and must exercise its discrimination. Thus, the part that is bad in an award may often be separated, when the direction is one simply in excess of the arbitrator's authority, as where it directs the payment of costs, which was a matter not referred to him; or where the defendant is awarded to pay one sum to the plaintiff, and another to a third party, who is not within the reference. So again, in a reference as to the mode by which certain lands are to be drained or irrigated, if the award, after properly ordering certain works for the purpose, goes on in excess of the reference, to direct respecting future repairs, or as to what is to be done in case the works are hereafter given up, this direction, though bad, is clearly separable. So again in the case of an alternative award, if the award be bad as to one alternative, or if it be impossible or uncertain, the award is good and absolute as to the other. Cases in which the objectionable part is not separable are such as where the arbitrator awards collectively on matters within and matters not within the reference, so that the court cannot see how much of the adjudication applies to each, and then the award will be bad *in toto*. So if there be a direction for B to pay a sum of money to A, on A, his wife, and his son conveying an estate, and the wife and son not being parties to the reference, the direction as to them is void; then, since B could not enforce the intended equivalent for which his money is to be paid, the whole award must be void. If by the nullity of the award in any part, one of the parties cannot have the benefit intended him as a recompense or consideration for that which he is to do to the other,

the award will usually be treated as void in the whole. (Russell on Arb., Part ii, c. v, s. 9.) The above brief summary drawn from a work of authority is perhaps as much as can be usefully gathered from the cases; for the special facts of each case must vary greatly, and every case must turn on its own facts. In *London and Blackwall Ry. Co.* v. *Cross* (31 Ch. D. 354), a rather remarkable case, the plaintiff Company obtained an injunction against the defendant to restrain him from proceeding to arbitration, using their name without authority, and involving their interests.

Application to awards of Ch. II.

With regard to the application of the preceding sections in this chapter to the specific performance of awards, I would only briefly point out that the court will often have to exercise its judicial discretion under s. 22, or it may have to consider the nature of the acts to be done, and how far s. 21 may apply to them; or since the award was made, something may have occurred which may call for the application of some one of the ss. 13 to 16 to the case. So the court may have to consider the bearing of the sections as to, for, and against what parties specific performance may be enforced. As

Misconduct of arbitrator.

to the other grounds of objection on the score of the conduct of the arbitrator or parties to the reference, little need be said. Corruption by the arbitrator or fraud by either party, must obviously vitiate any award. Misconduct is a wider term, and may exist where no moral impropriety can be imputed to the arbitrator, as where the proceedings before him have been conducted in a way contrary to the ordinary principles of natural justice; for though technical accuracy of procedure is not required of him, but only what is essential to the administration of substantial justice, the want of this may be fatal to the award. (*Thorburn* v. *Barnes*, L. R. 2 C. P. 384.) It has been held in England, and our courts may well adopt the same practice, that as the court has power to set aside an award for corruption on the part of the arbitrator, it will also interfere by injunction beforehand to prevent his proceeding with the arbitration, and so save the loss and delay of a futile award. (*Malmesbury Ry. Co.* v. *Budd*, 2 Ch. D. 113.) Though the misconduct falls short of corruption, the like relief may be granted; thus personal interest is a ground of incompetence in an arbitrator; so is unfitness from infamy, as perjury or fraud; so is other personal misconduct, unfitting a man for *quasi*-judicial

functions. The party ascertaining such misconduct need not wait for the award, but may intervene to have the arbitrator removed; and the remedy by injunction is an appropriate mode of relief for this purpose. (*Beddow* v. *Beddow*, 9 Ch. D. 89.) But this does not extend beyond misconduct on the part of the arbitrator there will be an injunction in a case where, if the thing went on, there would be no legal injury; there will be no injunction to restrain an arbitrator from proceeding in a matter beyond the agreement to refer, although in their result the proceedings may be futile and vexatious. In such a case it is open to the party to stay away, and he will not suffer, as nothing could be done to enforce such an award against him. (*N. L. Ry. Co.* v. *G. N. Ry. Co.* (11. Q. B. D. 30.) Rather a restricted view seems to have been taken in this case.

Enforcing awards under s. 525, Civil Procedure Code.

Where the award sought to be specifically enforced comes under s. 525, Civil Procedure Code, there seems no power in the court to remit the award; all that can be done under s. 526 is to consider and dispose of any ground of objection such as is specified in s. 520 or s. 521. In the two other kinds of arbitration, the court has power under s. 518 to modify or correct an award by striking out such part of it, where separable, as is in excess of the submission, or by amending matters of form, or obvious error not affecting the decision; and the arbitrators or umpire, instead of giving a direct decision, may state the whole or part of the award as a special case for the opinion of the court; but the grounds of objection specified in s. 520 will only justify at first the award being remitted for review; the obvious reason being that, in these two kinds of arbitration, the arbitrator is really the officer of the court, and renders his award to the court; but in the other case he is not so, and as soon as the award is made, he is *functus officio*. It may be presumed that, in practice, awards made out of court will, in the great majority of cases, be enforced, by the simple procedure provided by s. 525, Civil Procedure Code, though I am not aware that there would be any technical objection to a suit being brought in the ordinary form upon an award; but as I do not see that the plaintiff would have any advantage in so doing, it may be presumed that it will never be done. One who was not a party to the arbitration, and not bound by the award, cannot take advantage of it or enforce any benefit or right under it. (*Chaudhri Hira Singh* v. *Chaudhri Gunga Sahai*, L. R. 11 Ind. Ap. 20.)

Settlements directed by wills.

Lastly, as to executory settlements under a will, I need not add much to the remarks already made on the nature and scope of such settlements. (See *ante*, p. 56.) So long as the settlement directed remains executory, any party interested under it may sue the trustees or other representatives, in whom the property has become vested, to enforce the execution of the directions in the will for the conveyance or other disposal of the property; and this is the kind of specific performance contemplated by this section, and then in substance the suit will be such an one as is contemplated in s. 12, clause (*a*). When the directions in the will have been so far carried out that the settlement has become an executed one, then the instrument embodying the settlement may be enforced specifically for and against the like parties as an ordinary trust deed may be. In a case reported in L. R. 11. Ind. Ap. 135, a deed in the form of a settlement was treated as really a settlement by will, taking effect as such after death.

CHAPTER III.

OF THE RECTIFICATION OF INSTRUMENTS.

When instrument may be rectified.

31. WHEN, through fraud or mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified; and if the court find it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the court may in its discretion rectify the instrument so as to express that intention so far as this can be done without

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* This chapter has been taken from the New York Civil Code, the corresponding sections being articles 1899 to 1902 of that Code; ch. iv more or less corresponds to articles 1903 to 1905, and ch. v to articles 1906 to 1908 of the same Code.

prejudice to rights acquired by third persons in good faith and for value.

Illustrations.

(*a*) A, intending to sell to B his house and one of three godowns adjacent to it, executes a conveyance prepared by B, in which, through B's fraud, all three godowns are included. Of the two godowns which were fraudulently included, B gives one to C and lets the other to D for a rent, neither C nor D having any knowledge of the fraud. The conveyance may, as against B and C, be rectified so as to exclude from it the godown given to C; but it cannot be rectified so as to affect D's lease.

(*b*) By a marriage-settlement, A, the father of B, the intended wife, covenants with C, the intended husband, to pay to C, his executors, administrators and assigns, during A's life, an annuity of Rs. 5,000. C dies insolvent, and the official assignee claims the annuity from A. The court, on finding it clearly proved that the parties always intended that this annuity should be paid as a provision for B and her children, may rectify the settlement and decree that the assignee has no right to any part of the annuity.

General scope of this chapter.

It is necessary carefully to apprehend the scope of the specific relief granted by this chapter. It must be distinguished, on the one hand, from the relief given by way of defence to a suit for specific performance, either for the purpose of forcing upon a plaintiff a variation from the contract on the ground of fraud or mistake, or for the purpose, on the like ground, of resisting the performance of the entire contract, and, on the other hand, from the relief given to a plaintiff seeking actively on the same grounds for the rescission of the contract. Here the fundamental assumption is that there exists in truth between the parties a complete and perfectly unobjectionable contract, but the writing designed to embody it, either from fraud or mutual mistake, is incorrect or imperfect, and the relief sought is so to rectify the writing as to bring it into conformity with the true contract. The most frequent application of such relief is to cases of contract, but obviously the like necessity may arise, and the like equity must exist in respect to any other instrument in writing. In such a case as is assumed in this chapter, to enforce the instrument as it stands, must be to injure at least one party to it, to rescind it altogether must be to injure both, but to rectify it and then enforce it is to injure neither, but to carry out the intention of both. Hence it follows that in cases of rectification, the court does not put it to the other party to submit

to the variation alleged, but makes the instrument conformable to the intention of the parties without any such offer or submission. (Kerr on *Fraud*, 352.)

Fraud as the cause of error.

Where the error in the written instrument has been brought about by the fraud of one party, the equity of rectification is obvious; after a *bonâ fide* contract has been made between him and the other party, it is equally fraudulent on his part whether he actively procures, or passively, but wittingly, acquiesces in an error being introduced into the writing, and then afterwards seeks to take advantage of it. In England it frequently occurs that rectification or rescission is sought, generally on the ground of fraud, in respect to voluntary settlements, as by introducing a power of revocation, and so on. The law permits any one to dispose of his property gratuitously if he likes, and to do this irrevocably if he likes. On the one hand, if a voluntary deed is incomplete, the court will not compel the completion of the imperfect instrument; and, on the other hand, it will not help a person who has made a gift by a voluntary deed, to vary or repudiate it on any other or less distinct grounds than those on which it rectifies or rescinds other instruments. (*Hall* v. *Hall*, L. R. 8 Ch. 430; *Lister* v. *Hodgson*, L. R. 4 Eq. 30; *Phillips* v. *Mullings*, L. R. 7 Ch. 244.) Plaintiff was interested under a will; being regarded as a weak and improvident person, his uncle, a trustee under the will, induced him to execute a voluntary settlement, in which defendant was to be a co-trustee in favour of plaintiff for life and then his wife and children. Plaintiff sued to set it aside, and it was set aside on the ground that the settlor did not fully understand what he was doing and the effect of the settlement, or his position with regard to the property. This is the only question in such a case; and the inclusion of improper provisions or the omission of others is only of value as evidence on the question whether the settlement was understood. (*Dutton* v. *Thompson*, 23 Ch. D. 278.) In *James* v. *Couchman* (29 Ch. D. 212), there was a similar voluntary settlement with a view to protect a young man against himself. The ultimate limitation in default of the specific objects of the settlement was for his paternal next-of-kin. A usual power antecedent to the limitation would have been a power to appoint for others as he might think fit. The effect of the omission of such a power would have been that he could not provide, *e.g.*, for his own mother. It appearing that the omission of

such a power not having been brought to the knowledge of the settlor, the settlement should be rectified by introducing it; this was to make the settlement be what it originally should have been. The conduct of the trustees being otherwise quite unobjectionable, and the settlement one that might be maintained, they had their costs out of the estate. But as between a voluntary settlement and one for value there is this distinction: a voluntary settlement erroneously drawn up, either from fraud or mistake, may be rectified after the death of the settlor in accordance with his proved intention; but during his life, if he refuses to carry out the intention which it may be clearly proved that he originally had, an erroneous settlement cannot, against his consent, be rectified so as to conform to that intention; to do so would be to compel the settlor to perfect an agreement for a voluntary settlement, a thing the court never does unless there was a valuable consideration. But as the voluntary settlement, as executed, is shown to be erroneous, the settlor is entitled to have it rescinded, though he cannot be compelled to have it reformed. (*Lister* v. *Hodgson*, L. R. 4 Eq. 30.) One could not repudiate a portion only of a lease on the ground of fraud; it could only be avoided *in toto*. (*Anarullah Sheikh* v. *Koylash Chunder Bose*, I. L. R. 8 Cal. 118.)

Mistake as the cause of error.

Where there is no fraud, but both parties are equally innocent, neither can afterwards equitably seek to take advantage of the mistake common to both of them, which has crept into the instrument. So, rectification was in one case refused where mutual mistake was alleged. (*Mussamut Amanant Bibi* v. *L. Pershad*, 14 Ind. Ap. 18.) But observe that though, through some mistake either in matter of law or of fact, the writing fails to represent the real intention of the parties, it must be a mistake mutual or common to all the parties. If it appears that they took different views of what was intended, there would be no contract between them which could be carried into effect by rectifying the instrument. Rectification can only be had where all executed an instrument under a common mistake, and have done what none of them intended. A mistake on one side may be a ground of defence or a ground for rescinding, but not for correcting or rectifying an instrument. (Kerr on *Fraud*, 349, 351.) To rectify a contract where the mistake was unilateral and not mutual, is in effect to make for one party a new contract different from what he intended; and generally this would be when the court could not replace the parties *in statu quo*,

as where there has been a settlement followed by marriage. But as between vendor and purchaser this is often not so; and where in a suit by the vendor to rectify a deed of sale in which more land had been included than the vendor intended to sell, on its being proved that the mistake was not mutual, but that of the vendor alone, an option was given to the buyer to have the contract rescinded altogether or to have it specifically performed, but varied by the omission of the land entered by mistake. In substance this was treating the buyer as if he had been suing for specific performance, and the vendor had, under s. 26, clause (*a*), used the mistake as a defence; neither s. 31 nor s. 36 was in principle departed from. (*Harris* v. *Pepperell*, L. R. 5 Eq. 1; and see *Bloomer* v. *Spittle*, L. R. 13 Eq. 427.) This principle was adopted and followed in *Paget* v. *Marshall* (28 Ch. D. 255).

Intention of parties to be regarded.

Next, as to the intention in conformity to which the instrument is to be rectified, the true question is what was the intention of the parties at the time of its execution, and not what they would have done, if the result of what they did had then been present to them. (*Wilkinson* v. *Nelson*, 7 Jur. N. S. 480.) And when we ask what was the intention of the parties at the time of the execution, we mean their intention as to the meaning and legal effects of the instrument, and not merely as to the language in which they were to be expressed; that is, regard is to be had to the substance of the matter, and not to the mere form of words in which it was to be clothed. This is, as I conceive, the purport of s. 33, and also of the rule to be derived from the English cases. (See *Walker* v. *Armstrong*, 8 D. M. & G. 531.) The parties are intending to produce a particular result, either legal or actual, and they execute the instrument supposing the language of it will effect this, and it is equally immaterial, whether the language used is or is not what was intended, if the result is not. The two old typical English cases of *Irnham* v. *Child* (1 Bro. C. C. 92), and *Worral* v. *Jacob* (3 Mer. 270) are in accordance with this rule; if a power to redeem or a power of revocation is intentionally left out of an instrument under the mistaken notion that its insertion is either illegal or superfluous, it would not be allowable under this chapter to rectify the instrument by inserting it; for it is not a mere question of words but of substance; the parties never intended that the power in question should form part of the instrument, and though the motive for omission was a mistake of law, still to insert it afterwards [illegible]

substitute a different instrument from what was within their intention at the time of its execution. If the power had been intended to be put into the instrument, and omitted by a mistake in the draft, or from the language used (though that which was intended) not being appropriate to include it, it would have been a very different matter. (1 Story's Eq. 112.) Hence it seems to follow that rectification will not be applied in a case in which a matter has been completely overlooked on both sides; nor to add to the agreement a term which had not been determined upon, or was not agitated between them; nor if it was by the intention of the parties that the written instrument did not comprise all the terms of the actual agreement. (*Parker* v. *Taswell*, 2 D. & J. 559; *Elwes* v. *Elwes*, 3 D. F. & J. 667; 7 Jur. N. S. 302; Kerr on *Fraud*, 357.) In *Amanat Bibi* v. *Lachman Persad* (I. L. R. 14 Cal. 308) the mortgagor alleged that a sum in excess of his debt to the mortgagee had been inserted in the mortgage-deed. The court, however, not finding that there was any fraud or deceit, or that there was any mutual mistake as to the amount, dismissed plaintiff-mortgagor's suit under this section to have the instrument rectified. In *Mahomed Bhoy* v. *Puddumsee* (I. L. R. 20 Cal. 854), the question was referred to the High Court by the Presidency Small Cause Court whether it could entertain a suit under the following circumstances. A broker, in effecting a contract between plaintiff and defendant, inserted by mistake somebody else's name in the sold note instead of the plaintiff's. Plaintiff sued for damages for breach of contract, and the objection was taken that inasmuch as the suit was in effect to rectify the agreement, the Small Cause Court had no jurisdiction to entertain it. The High Court held that there was a contract between the parties for breach of which the plaintiff could sue for damages.

The kind of evidence required.

The next question is as to the evidence needed for the purpose of rectification. The section says that it must be "clearly proved;" and this is the language of English cases. On the one hand, the danger of setting aside the solemn engagements of parties when reduced to writing, by the introduction of parol evidence, substituting other material terms and stipulations, is sufficiently obvious; but, on the other hand, a court of equity would be of little value if it could suppress only positive frauds, and leave mutual mistakes, innocently made, to work intolerable mischief, contrary to the intention of the parties.

It would be to allow an act, originating in innocence, to operate ultimately as a fraud, by enabling the party who receives the benefit of the mistake to resist the claims of justice, under shelter of a rule against the admission of parol evidence to vary written instruments, which was framed to promote it. Relief should, therefore, be given only where the proof is clear and satisfactory. But this does not mean that the evidence must be in its nature or degree incapable of refutation, but that it should be clear of all reasonable doubt; and though Judges will always differ as to the result and weight of evidence, yet the rule acts as a caution against giving relief upon a mere balance of evidence, or where it is loose or equivocal, or in its texture open to doubt, or to opposing presumptions. (1 Story's Eq. 154, 155, 157.)

Prior writings as evidence.

The evidence may be of two kinds, namely, that of some preliminary document, as articles, a rough draft, letters and so on; or merely oral evidence. There is less difficulty and danger of mischief where the court acts upon the former, than when all it has to guide it is the latter kind of evidence. Thus marriage settlements are often reformed so as to conform to the previous articles, and conveyances of real estate are in like manner controllable by the terms of the prior written contract; or a discrepancy in one deed may be cleared up by means of its counterpart. (*Burchell* v. *Clark*, 2 C. P. D. 88.) Memoranda of a less formal character are also admissible for the same purpose. But in all such cases it must be plainly made out that the parties meant, in their final instruments, merely to carry into effect the arrangements designated in the prior contract or articles. For as they are at liberty to vary the original agreement if a new intent has supervened, the very circumstance that the final instrument differs from the preliminary contract affords some presumption of an intentional change of purpose, unless there is some recital in it, or some other attendant circumstance, which demonstrates that it was merely in pursuance of the original contract. (1 Story's Eq. 160.) Hence, if in the original agreement doubtful or ambiguous words have been used, the final instrument may be fairly taken as the construction which the parties have put upon those doubtful or ambiguous words. (*Breadalbane* v. *Chandos*, 2 My. & Cr. 739.) Where the articles are before, and the settlement not till after the marriage, it is an almost inevitable inference that the latter was intended to be in strict pursuance of the former; but if both are before, there is not the same ground for an

inference. (*Bold* v. *Hutchinson*, 5 D. M. & G. 558; *Cogan* v. *Duffield*, 2 Ch. D. 44.) Mere oral evidence is far less satisfactory in general, though it may possibly, in some cases, afford the necessary clearness of proof. Sometimes the nature of the transaction will greatly assist, as where there is a joint loan to two or more, and the bond is joint only, and not joint and several; but the nature of the whole transaction must be fully scrutinized, for the inference is not inevitable. (1 Story's Eq. 162—4.) So, where the lender of money on bills of exchange, by a clear blunder, signed her name near that of the drawer instead of on the back as indorsee, the bills were rectified. (*Druiff* v. *Parker*, L. R. 5 Eq. 131.) But it is always necessary for a plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified, and that such contract is inaccurately represented in the instrument; for equity does not rectify contracts, but only instruments purporting to have been made in pursuance of the terms of contracts; and, therefore, it does not rescind or alter a contract with reference to the terms of the negotiation which preceded it (*Mackenzie* v. *Coulson*, L. R. 8 Eq. 375.) In several cases marriage settlements have been rectified mainly on a consideration of their terms and of the surrounding circumstances of their execution (*Lovesy* v. *Smith*, 15 Ch. D. 655; *Hanley* v. *Pearson*, 13 Ch. D. 545; *Clark* v. *Girdwood*, 7 Ch. D. 9); and in one rather strong case a family settlement was, on such grounds, rectified as against an infant tenant-in-tail (*Welman* v. *Welman*, 15 Ch. D. 570). It seems a reasonable condition that a party, having a right to rectification, should come promptly after he has acquired a knowledge of his right, and not leave the other party in suspense as to whether he will exercise his right, or leave the deed as he finds it. (*Turner* v. *Collins*, L. R. 7 Ch. 329.) As a point of practice I may add that in England, in most cases, it has been held enough to note on the deed the rectification decreed, and not to require a fresh deed to be drawn up. (*White* v. *White*, L. R. 15 Eq. 247, and many other cases.)

Oral evidence.

There remains only the proviso at the conclusion of the section that rectification can only be applied "so far as this can be done without prejudice to rights acquired by third persons in good faith and for value;" or, in other words, it cannot be applied against a purchaser for valuable consideration without notice. The subject of notice has already been

Proviso as to third parties.

fully considered (*ante*, p. 48); and there is an obvious equity in its application in the case of rectification. Illustration (*a*) contains an example of rectification applied on the ground of fraud and yet limited in its application as against third persons. Here C and D are equally innocent and equally without notice, but C being a mere volunteer receives no protection; and D being a purchaser for value, the rectification is, as to him, limited, but only so far as is necessary; that is, A will be substituted for B, and D is not injured if he holds under A instead of B, but on the terms of the tenancy agreed upon with B. Illustration (*b*) is an example of rectification applied on the ground of a mutual mistake as to the result, actual or legal, of the terms used; for the object of the parties was, by the settlement, to produce a certain result, which the contract as framed is not calculated to produce (sec. 26 (*d*)); and here a consideration of the nature of the transaction, coupled with some direct evidence, written or oral, would readily afford that clear proof of intention which the section requires. In this way words clearly appearing, from a consideration of the structure of the instrument as a whole, to have been left out in one part of it through oversight, may be supplied; thus, where the clear intention was to provide for sons and daughters alike, and in one sentence sons only were mentioned, the word "daughters" was put in; and in another case where in a settlement it clearly appeared from other parts that it was intended to pass the fee-simple, the word "heirs" was supplied to effect this. (*In re Daniel's Trusts*, 1 Ch. D. 373; *In re Bird's Trusts*, 3 Ch. D. 214.) The following are a few instances where rectification has been allowed; for a mistake of a settlement which made it operate as a disentailing deed (*Hall-Dare* v. *Hall-Dare*, 31 Ch. D. 251); where there was a covenant to settle, and a release by the wife in mistake (*In re Garnett*, 31 Ch. D. 648); where, in the marriage settlement of an infant, property was omitted by mistake. (*Miles* v. *Fox*, 37 Ch. D. 153.)

The Illustrations to the section.

32. For the purpose of rectifying a contract in writing, the court must be satisfied that all the parties thereto intended to make an equitable and conscientious agreement.

Presumption as to intent of parties.

This provision, which is limited to the case of a contract, is almost, perhaps, an unavoidable qualification of the right to apply for

rectification. It is useless to rectify a written contract, if, when the writing is brought into conformity with the agreement as originally intended, the result would be to establish a contract, which is such, in its nature, that it would be against equity and good conscience to grant any relief upon it.

Principles of rectification.

33. In rectifying a written instrument, the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be.

The purport and limits of the rule here laid down have been already noticed (*ante*, p. 244).

Specific enforcement of rectified contract.

34. A contract in writing may be first rectified and then, if the plaintiff has so prayed in his plaint and the court thinks fit, specifically enforced.

Illustration.

A contracts in writing to pay his attorney, B, a fixed sum in lieu of costs. The contract contains mistakes as to the name and rights of the client, which, if construed strictly, would exclude B from all rights under it. B is entitled, if the court thinks fit, to have it rectified, and to an order for payment of the sum, as if at the time of its execution it had expressed the intention of the parties.

It is somewhat singular that English courts of equity should have ever hesitated, after rectifying a written agreement so as to bring it into conformity with what was intended, to proceed to grant the further relief of specifically enforcing it as varied, and established by the evidence. It would seem to be now, under recent legislation, the duty of the court to do so. So now, in England, in case of mutual mistake, the court may rectify and then order specific performance (*Olley* v. *Fisher*, 34 Ch. D. 367). But after an agreement has been carried out, and money paid under it, there can be no suit for rectification and then to compel the re-execution in accordance therewith, although the question of construction may not have been

before raised, and so may not be strictly *res judicata*. (*Caird* v. *Moss*, 33 Ch. D. 22.)

In an American court it has been well said, "that it cannot make any difference in the reasonableness and justice of the remedy, whether the mistake was to the prejudice of one party or the other (that is, whether of the plaintiff or the defendant). If the court has a competent jurisdiction to correct such mistakes (and that is a point understood and settled), the agreement, when corrected, and made to speak the real sense of the parties, ought to be enforced, as well as any other agreement perfect in the first instance. It ought to have the same efficacy, and be entitled to the same protection, when made accurate under the decree of the court, as when made accurate by the act of the parties." (1 Story's Eq. 161, note (1).) The Illustration to this section is taken from the case of *Stedman* v. *Collett* (17 Beav. 608).

CHAPTER IV.

OF THE RESCISSION OF CONTRACTS.

General scope of, and distinction between, ch. iv and ch. v.

THIS and the following chapter have much in common; indeed, in English treatises the subjects are generally discussed together. As in the case of specific performance, the granting of the specific relief provided in these chapters is a matter of sound discretion, *secundum arbitrium boni judicis*; and if the relief be granted, the court may impose such terms upon the plaintiff as the justice of the case requires for the maxim is emphatically applied that he who seeks equity must do equity. (1 Story's Eq. 693.) This principle is fully recognised by s. 38 in ch. iv, and by the precisely similar s. 41 in ch. v. Hence, it seems to follow that under both chapters an agreement or instrument may be rescinded or cancelled upon the application of one party, when the court would decline any interference at the instance of the other; and though specific performance may be refused, the court may yet decline to order the agreement, of which specific performance was sought, to be delivered up or rescinded. (1 Story's Eq. 693.) Hence, it will be noticed that the terms of s. 37 are permissive only, and not imperative. It is, however, a leading principle of the procedure of our courts, that once the proper court is duly seized of a subject-matter of litigation between two parties, it is bound to dispose

of it once for all; there is no such intermediate course possible (as there was in English courts of equity) as to refuse specific relief, and yet to leave the parties to pursue their remedy upon the same cause of action, in another suit, and in a different form of action. The delivery up of the contract or instrument, will, as I apprehend, follow alike upon the relief of rescission or of cancellation. The term "instrument" in ch. v is, of course, a wider one than "contracts in writing;" and the relief of cancellation, it will be seen, applies to every kind of document; but I doubt if there is practically any difference between the two words "rescission" and "cancellation," or if they are generally used with much regard for their proper meanings; though it may be as well to notice that "rescinding" a document implies that the document is still operative; and by "rescission" its operation is put an end to; but "cancelling" a document does not necessarily imply its being operative; for it may really have long ceased, or have never begun to be so; and by "cancellation" it is merely made to appear upon the face of it that it is invalid.* The examination of the different sections of these two chapters will show that the severance in this Act of the two subjects of "rescission" and "cancellation" is more systematic and convenient than treating them together.

When rescission may be adjudged.

35. Any person interested in a contract [in writing]† may sue to have it rescinded, and such rescission may be adjudged by the court in any of the following cases, namely :—

(*a*) where the contract is voidable or terminable by the plaintiff;

(*b*) where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff;

* In a note in the New York Civil Code it is suggested that there may be a judgment of rescission without cancellation, as it may be desirable to have a judgment upon the validity of a contract without going further; but the distinction is rather thin.

† The words "in writing" have been repealed by Act IV of 1882 and are therefore only to be read as part of the section in those parts of India where the Trusts Act is not in force.

(*c*) where a decree for specific performance of a contract of sale or of a contract to take a lease, has been made, and the purchaser or lessee makes default in payment of the purchase-money or other sums which the court has ordered him to pay.

When the purchaser or lessee is in possession of the subject-matter, and the court finds that such possession is wrongful, the court may also order him to pay to the vendor or lessor the rents and profits, if any, received by him as such possessor.

In the same case, the court may by order in the suit in which the decree has been made and not complied with, rescind the contract, either so far as regards the party in default, or altogether, as the justice of the case may require.

Illustrations

to (*a*) :—A sells a field to B. There is a right of way over the field of which A has a direct personal knowledge, but which he conceals from B. B is entitled to have the contract rescinded.

to (*b*) :—A, an attorney, induces his client, B, a Hindu widow, to transfer property to him for the purpose of defrauding B's creditors. Here the parties are not equally in fault, and B is entitled to have the instrument of transfer rescinded.

Here clauses (*a*) and (*b*) are general, applying to all contracts, and clause (*c*) limited to two kinds, namely, a contract of sale, or a contract for a lease. In clause (*a*) the contract is taken to be either voidable or terminable by the plaintiff. A voidable contract must be taken to be such an one as is described in s. 19, Indian Contract Act, and the sections annexed thereto. A misrepresentation may be innocent and yet fatal: thus, where land had been represented and conveyed as freehold and turned out to be copyhold, the contract was rescinded; for though the defendant believed it to be freehold, yet he took upon himself to assert for his own benefit that to be a fact which was not, though he believed it to be so; and being material, it was a fraud upon the other party.

Clause (*a*).

Voidable contract, what is.

(*Hart* v. *Swain*, 7 Ch. D. 46.) In *Joliffe* v. *Baker* (11 Q. B. D. 255) the case of *Hart* v. *Swain* was commented upon and said to be a case of actual fraud. It was maintained (pp. 270—275) that there is no such distinction as legal, apart from moral, fraud. In *Boswell* v. *Coates* (27 Ch. D. 424), defendants had purchased from the court a life-interest sold under the order of the court, and there had not been a full disclosure by them of all the information they had as to the value of such life, and after eight years' delay, the sale was rescinded at the instance of creditors, and an account taken on the footing of such rescission. The court laid down that it was the duty of persons dealing with courts of justice to give full information. On the other hand, where a contract is only voidable on the ground of fraud, at the option of the party injured thereby, he must be in a position to rescind entirely: thus, where the plaintiff has taken the whole benefit of the deed so far as it was beneficial to him, without at any time attempting to repudiate it, and it being now impossible to restore the defendant to his original position, he seeks to destroy one particular part of the contract, he cannot do so. (*Urquhart* v. *Macpherson*, 3 Ap. Cas. 838.) And generally a contract originally voidable must, at the time of suit for rescission, continue to be voidable. A party defrauded may, either by words or conduct, determine his election either to affirm or to avoid the contract; and the election, either way once made, is determined for ever, So long as he has made no election, he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind. (*Clough* v. *L. & N. W. Ry. Co.*, L. R. 7 Ex. 35; *James* v. *Young*, 27 Ch. D. 663.) Hence, a shareholder, induced to become so by fraud, cannot, after the company is wound-up, come for rescission, because of the rights of innocent third persons; and such are not only the creditors of the company, but also other shareholders, who, like himself, may have been equally led by fraud to take shares. (*Burgess's case*, 15 Ch. D. 511.) An equity that would entitle a shareholder to be relieved from his shares in a going concern will not avail if brought forward only after the winding-up of the company has begun; and there must be not only repudiation, but steps taken to enforce it before such winding-up, for after it, the equity cannot be set up against the creditors and

co-contributors (*In re Scottish Petroleum Co.*, 23 Ch. D. 429). It must be noticed that this clause does not include void contracts, which are also described in s. 23 to s. 30, Indian Contract Act. If a contract is void, and its nullity is apparent upon the face of it, the specific relief of rescission is not applicable to it; but if a contract is apparently operative but is really unlawful, then, in certain cases, clause (*b*) allows of the relief of rescission to put an end to this appearance. Herein is a distinction between "rescission" and "cancellation," as the latter relief is applicable alike to void and voidable instruments, and whether the nullity is apparent or not. Bacon, V. C., in *In re Dames* and *Wood* (27 Ch. D. 172, at p. 178), refers to certain cases in which the grounds on which such stipulations may be used, *Dudell* v. *Simpson* (L. R. 2 Ch. 102) being the chief one. *In re Dames* and *Wood* was affirmed in appeal (29 Ch. D. 626). It was there stated that a vendor, under a clause to rescind, need not give notice to the purchaser that he will rescind unless the requisition and objections are withdrawn. He may rescind at once, just cause having arisen for him to do so under the clause.

Terminable contract, what is.

A terminable contract is one which contains (as is frequently the case) a stipulation that in a certain event it may be put an end to. A stipulation that if the vendor cannot deduce a good title, or if the purchaser shall not pay the money by an appointed day, the agreement shall be terminable, does not enable either party to vitiate it by refusing to perform his part of it; thus, the seller may avoid the contract if the purchaser do not pay the money; the purchaser may avoid it if the seller do not make a title, or the contract will be void if the seller *cannot* make a title; but it is not sufficient for him to *say* that he cannot. But where the seller reserves a power to rescind the contract instead of answering objections to the title, he may do so, though the objection was, under a mistake in law, untenable, and the seller could have made a good title; but if he once elect to answer, he is precluded from afterwards rescinding the contract; and the same rule would apply where the condition limits the purchaser's right to make objections. (Sugden's V. & P. 18, 16, 285.) Stipulations for the right to rescind may vary greatly, and much will turn on their special form; but the general principle is that they must be acted upon *bonâ fide*, that the occasion must be within the stipulation (*In re Jackson and Oakshott*, 14 Ch. D. 854), and the right must be used

as soon as it arises, and once waived, cannot be fallen back upon; but the waiver of the right to rescind on the occurrence of one event does not hinder the use of another and distinct condition for the like right on the occurrence of a subsequent event. (Sugden's V. & P. 211.)

Grounds of relief under clauses (*a*) & (*b*).

The relief of rescission in cases falling within clauses (*a*) and (*b*) may be sought on the ground of accident, mistake, or fraud. But accident or mistake may not, in all cases, go to the very foundation and merits of the agreement, but may only require that some amendment, addition, qualification, or variation should take place, to make it at once just and reasonable, and fit to be enforced. (1 Story's Eq. 694.) Hence, the limitation in s. 36 against relief on the ground of mere mistake where the parties cannot be put *in statu quo*. The mistake intended by this section must, I presume, be such as, agreeably with ss. 20-22, Indian Contract Act, would render the contract voidable; but though voidable on this account, it will not be sufficient, where there is nothing more than the mistake, to justify rescission, unless the parties can be substantially restored to their position; for where there is a mere mistake and both parties are equally innocent, if they cannot be restored, neither has a better equity than the other, and the burden must lie as it falls; unless, of course, the mistake is such as to be within s. 20, Indian Contract Act, and render the contract not merely voidable, but void; as where there is a mistake as to the substance of the thing bargained for, and not merely a difference in some of its qualities or accidents. (*Kennedy* v. *Panama, &c., Co.*, L. R. 2 Q. B. 587.) It might not, perhaps, be easy to suggest what, under s. 22, Indian Contract Act, must be added to a mere unilateral mistake of fact in order to render the contract voidable; for it seems to be assumed that a unilateral mistake of fact, with something added to it, may have this effect. Thus, if to such mere mistake is added the consideration that the contract would involve hardship on one party, and its rescission would involve no such hardship on the other party, and both can be restored, this might suffice to justify a rescission under s. 36. If so, then a strong English case of rescission where a purchaser had, by his own mistake, given an unreasonable price for an estate, and the contract was on his suit rescinded, would be covered by s. 36. There a house was sold which was liable to two rents, payable to two different parties, and the plaintiff

Effect of s. 36.

purchased and paid for it on the calculation of its value as liable to only one, and that the smaller rent. The mistake was entirely his own, and yet the contract was rescinded. (*Morshead* v. *Fredericks*, cited in Sugden's V. & P. 95, but not reported.) In cases of this kind delay may operate as a defence, and as such, it has two aspects; for (1) lapse of time may have so changed the condition of the thing sold or of the parties, that the parties cannot, by means of compensation or allowance, be put *in statu quo*, and for rescission the possibility of a *restitutio in integrum* is essential; or (2) delay may be such as fairly imports acquiescence. (*Erlanger* v. *New S. P. Co.*, 3 Ap. Cas. 1218; and see *Willmott* v. *Barber*, 15 Ch. D. 96.) If an agent buys property before the agency, and then sells it to his principal without disclosing the fact of its being his, the principal would be entitled to rescind on discovery of the concealment; but if in the interval rescission has become impossible, he is not entitled to claim the difference between the price paid by the agent and that which he paid to the agent, or the difference between the latter's price and the real market value at the time. (*In re Cape Breton & Co.*, 26 Ch. D. 221; followed in *Ladywell M. Co.* v. *Brookes*, 35 Ch. D. 400.) It seems that where mistake of fact is a ground for relief, it is not the less so because the person who has made the mistake had the means of knowledge. (*Willmott* v. *Barber*, supra.) In order that the remedy of rescission should be lost by *laches* or delay, it is, if not universally, at all events ordinarily, necessary that there should be sufficient knowledge of the facts constituting the title to the relief. And if fraud is established against one party, who pleads as a defence delay by the other, the *onus* is on the former to show when the latter acquired the requisite knowledge of his right. (*Lindsay P. Co.* v. *Hurd*, L. R. 5 P. C. 241.) A right to rescind may be lost by conduct. Thus, if a contract for the sale of land is silent as to the title which is to be shown by the vendor, the legal implication that the purchaser is entitled to a good title may be rebutted by evidence that, before the execution of the contract, the purchaser had notice of defects in the vendor's title. But if the contract expressly provides that a good title shall be shown, the purchaser is entitled to insist on a good title, notwithstanding that before the execution of the contract he had notice of defects in the vendor's title. If the contract contains no stipulation as to possession being taken by the purchaser before completion, and he takes possession with knowledge that there are defects in the title which the vendor cannot

remove, the taking possession (especially if followed by expenditure of money on the premises) amounts to a waiver of the purchaser's right to require the removal of those defects or to repudiate his contract. If, on the other hand, the defects are removable by the vendor, the taking possession does not amount to such a waiver. But a purchaser who has thus lost his right to rescission may yet be entitled to compensation for defects in the title (*In re Gloag & Miller's Contract*, 23 Ch. D. 320, Fry, J.). To take a case out of the rule that a purchaser is entitled to require a good title, he must have known at the time of the contract that a good title could not be made. A want of license to assign is not a good ground of objection to title till the time has come for producing it. (*Ellis* v. *Rogers*, 29 Ch. D. 661.)

Mistake or ignorance of law.

By s. 21, Indian Contract Act, a contract is not made voidable by a mistake of law, but it is desirable to notice what is a mistake of law; for there have been cases of rescission, giving rise to much discussion, where parties have dealt with each other under a mutual mistake that the legal title to an estate has been in one of them, when in truth it has been in the other, and so a man has been induced to purchase his own property. In a case of this kind in the House of Lords, where a man had, under a mutual mistake of this kind, taken a lease of his own property, the agreement was rescinded, and in the course of the judgment, it was said that where the parties have dealt with each other under a mutual mistake as to their respective rights, there is no doubt as to the rule of equity, for in the maxim "*Ignorantia juris haud excusat*" the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake. Now that was the case with these parties,—the defendants believed themselves to be entitled to the property, the plaintiff believed that he was a stranger to it, the mistake is discovered, and the agreement cannot stand. (*Cooper* v. *Phibbs*, L. R. 2 H. L. 170; *ante*, p. 135; *Jones* v. *Clifford*, 3 Ch. D. 779; *Daniel* v. *Sinclair*, 6 Ap. Cas. 181; see Story's Eq. 122—24, 137, 139

note, where a similar explanation is suggested.) This seems consistent with s. 21, Indian Contract Act, which does not speak of a mistake of law, but "a mistake as to any law in force in British India," that is, a mistake as to the general law of the realm, but not as to the existence of a particular legal title. In *Soper* v. *Arnold* (37 Ch. D. 96) the purchaser made default in payment and the contract was rescinded, he forfeiting the deposit. On a subsequent sale, it was discovered that the vendor had not a good title, and the first purchaser might have taken advantage of this if he had known it at the time. He afterwards sued to recover his deposit, but the court would not allow him to take advantage of his mistake of law and dismissed his suit. In *Pullen* v. *Ready* (2 Atk. 587), an agreement was made between brothers and sisters on the assumption that a condition in a will that marriage without consent should work a forfeiture of the interest under the will, was void in law; and relief was refused, as it was a mistake of law. The test for distinguishing between such a case as *Cooper* v. *Phibbs* and *Pullen* v. *Ready* seems to be this: upon what false assumption was the contract directly and immediately founded? If on one of law, as in *Pullen* v. *Ready*, and in Illustration (*a*) to s. 21, Indian Contract Act, there is no relief; if on one of fact—though that fact may be the result of matter of law—as in *Cooper* v. *Phibbs*, there will be relief. If A and B contract about x, on the assumption that it is A's property, when it is already B's, the contract is made under a mutual mistake of fact. (*Bingham* v. *Bingham*, 1 Ves. 126.) I would suggest whether what serves to distinguish such a case as *Bingham* v. *Bingham* is said to have been "from any other purchase in which the vendor turns out to have no title" (see *Stewart* v. *Stewart*, 6 C. & F. 911), may not be, that, in every sale of property by A to B, there must be taken to be present, as inherently essential to the notion of such a contract, a mutual assumption that the thing is not already B's property. Except there be this basis of fact common to both parties, the transaction may be some other, and perhaps valid agreement, but it would not be a contract of sale. If A knows it is already B's property, it is a fraud; if B knows it, he makes to A a gift of the purchase-money; if neither knows, but both are in doubt, it is a compromise; for it to be a contract of sale, both must assume that it is not. Whereas in any other purchase there is no assumption as to title in third persons; but B buys such title as A has against every other third person, and B acts on the maxim of *caveat emptor*; and if

he buys a bad title, and has no covenant from A, he is necessarily without relief.*

If the ground for relief is not the innocent one of mistake, but is fraud, or other like cause rendering the contract voidable at the option of the innocent party affected thereby, the relief of rescission will be granted; but where the case is one of unlawful contract, such as is contemplated in clause (*b*), the relief will not always be given, for there may be circumstances in the case placing the parties *in pari delicto*, or from the demerit of the plaintiff, justifying a refusal of all relief, or only upon the terms of compensation. In English law these latter are often called cases of constructive fraud,—a not very convenient or precise term: it will be better to speak of voidable and unlawful contracts, and then the cases in which relief will be given may be divided into four classes, namely: (1) voidable contracts in which plaintiff is the injured and innocent party; (2) unlawful contracts in fraud of public policy in which plaintiff has not participated; (3) the like cases in which plaintiff has equally participated, but public policy would be defeated by allowing the contract to stand; (4) the like cases where both parties are in fault, but they are not *in pari delicto*. The first and second classes are quite clear. The third class [if indeed it can be brought strictly within the terms of clause (*b*)], may be illustrated by a gaming security which will be decreed to be given up, though both parties shared equally in the violation of the law, as public policy will be best subserved by so doing. The fourth class is where, although both parties have participated in the guilty transaction, yet the plaintiff has done so under circumstances of oppression, imposition, hardship, undue influence, or great inequality of age or condition; so that in a moral as well as in a legal point of view, his guilt may well be deemed far less dark in its character and degree than that of the defendant. (1 Story's Eq. 694-5.) The Illustration to clause (*b*) is intended as an example of this class. But though an agreement be void by positive law, or be held void or voidable on equitable grounds,

Cases within clause (*b*).

* The subject is one of admitted difficulty; see 1 Story's Eq. 111 to 139; *Bingham* v. *Bingham* and *Lansdowne* v. *Lansdowne* (2 J. & W. 205) were probably both cases of compromises of doubtful rights, and both, as such, wrongly decided. A recent excellent work, H. A. Smith's Principles of Equity, p. 179, disapproves of *Cooper* v. *Phibbs*.

yet relief may be refused except upon terms; thus, where a transaction is unconscionable or usurious, the borrower can have relief only upon repaying what is fairly due or allowable. (1 Story's Eq. 696.) On the other hand, if the plaintiff is the sole guilty party, or has participated equally and deliberately in the wrong, or where the agreement which he seeks to set aside is founded in illegality, immorality, or base and unconscionable conduct on his own part, he may be left to take the consequences of his own iniquity; for the sole cause of his praying relief is the failure of his scheme to entangle others, or to violate the best interests and morals of social life. (1 Story's Eq. 697.) In one case, which may serve as an illustration, where prior to A and B going through a form of marriage which both knew to be invalid, A made a settlement, on the face of it good, but really in consideration of the fictitious marriage, of certain property upon B, and they then lived together as husband and wife, and after A's death his representative sought to set it aside as founded upon an immoral consideration, this was refused. The contract, it was observed, was one entirely executed, and in no way executory; it was one thing to execute a contract of this kind, and to allow a woman to recover what was *premium pudicitiæ*, but quite another to take the property out of her hands after it had been fully transferred; and so all relief was refused. (*Ayerst* v. *Jenkins*, L. R. 16 Eq. 275.)

In order that a contract should be set aside under s. 35, the plaintiff should be shown to have been less to blame in the transaction than the defendant. There is nothing necessarily unlawful in two or more persons agreeing not to bid against one another at an auction-sale. (*Hari Balkrishna* v. *Naro Moreshvar*, I. L. R. 18 Bom. 342.)

Clause (*c*).

Where there has been a decree in favour of a purchaser or lessee for specific performance of a contract of sale or lease and he then is in default by non-payment of what, under the decree, he was bound to pay, the other side may take advantage of this default and sue to rescind the original contract of sale or lease. This, it would seem, must be in a fresh suit, and so far this differs from the English practice, where the order would be made in the same suit, though a short day for payment would be given. (*Foligno* v. *Martin*, 16 Beav. 586; *Sweet* v. *Meredith*, 4 Giff. 207; *Watson* v. *Cox*, L. R. 15 Eq. 219; but see *Henty* v. *Schroder*, 12 Ch. D. 666; but *quære*, this case as to the refusal of damages; it would seem to be the right practice in our courts.) The

court will refuse to rescind until there has first been the usual decree for specific performance and then default by the purchaser (*Stone* v. *Smith*, 35 Ch. D. 188.) But if the purchaser or lessee has meanwhile got into possession, and that possession is wrongful, then by the second and third paragraphs of clause (*c*) there need not be a fresh suit, but the order to rescind the contract may be made in the original suit, and at the same time the purchaser or lessee may be ordered to pay any rents and profits he has received, that is, as I conceive, such as he has actually received, and not also such as, but for his wilful default, he might have received. Any special damages from breach of the agreement to which the vendor or lessor might be entitled may also, as I conceive, be added, whether the rescission be ordered in a separate suit for that purpose, or in the original suit for specific performance. The principle justifying the English practice is that the court being once seised of the litigation, any orders touching the same subject-matter, even after decree, should be made in the same suit; and, if I may say so, that seems in all cases the better procedure. From what was said on the passing of this Act, it may have been intended to follow the English practice in all cases within clause (*c*). The doubt is whether such intention has been expressed. The opening words of s. 35 must, grammatically, be read with the first sentence of clause (*c*), and so read, a new suit for rescission is assumed. In the second paragraph of the clause, a particular variety of the general case, and an additional kind of relief are specified and provided. The words in the third paragraph "in the same case" are grammatically applicable only to the variety of case so specified. Courts must, of course, be guided, not by what the legislature intended to say, but by what it has said.

Rescission for mistake.

36. Rescission of a contract [in writing] cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made.

The bearing of this section has been already noticed (*ante*, p. 256).

* The words "in writing" have been repealed by Act IV of 1882 and are therefore only to be read as part of the section where the Indian Trusts Act is not in force.

S. 36 and s. 38 compared.

Section 36 and s. 38 do not seem to differ very materially, as in every case of rescission, he who seeks equity must do equity, and under s. 38 it is assumed that this may be done by payment of a money-compensation; but where mere mistake is the ground of rescission, the justice of the condition that the parties can be put *in statu quo*, is more clearly obvious. Where there has been a transfer of property, this will generally be by restitution of the property, with an account of its profits, and an allowance for any deterioration. But in any case, it must be borne in mind that, though the right of rescission may be at an end, this may not debar the plaintiff from any other appropriate relief, such as damages. (*Erlanger* v. *New S. P. Co.*, 3 Ap. Cas. 1278.)

Alternative prayer for rescission in suit for specific performance.

37. A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly.

This provision is in accordance with English practice, but must, I apprehend, be subject to the like proviso, that this alternative relief is based on the same state of facts, though with different conclusions as to law. It would not be allowable to set up two totally inconsistent states of facts, and to ask in the alternative for totally different forms of relief on wholly inconsistent grounds. Thus, a vendor may reasonably claim that a contract of sale of land may be specifically enforced, but if the court should be against him on the ground, for example, that the title he is able to make is, as to part, too doubtful to be forced on the purchaser, that then the contract may be wholly rescinded. This is merely to seek to wholly enforce or wholly set aside the contract. In such a case, if the purchaser has meanwhile been in possession, it would be proper, in decreeing rescission, to decree an account of rents and profits. To reverse the alternative claim for relief, as to seek to rescind on the ground of fraud, or in the

alternative to decree specific performance of the contract, or of a compromise relating to it would, I apprehend, be not allowable. (Fry on Sp. Perf. 457).

38. On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require.

Court may require party rescinding to do equity.

In most cases of rescission the special circumstances of each case will more or less affect the measure of compensation to be applied; the general principle being to seek, by means of compensation, to restore the parties to substantially the same position as if the contract had never been made; and where both are equally innocent, there ought not to be a bias unfavourable to the defendant, but if the misconduct of the defendant has furnished the ground for the rescission, he can scarcely expect the court to be curiously precise on behalf of a wrong-doer. The nature and extent of the right to indemnity on rescission of a contract was fully considered and stated in *Newbigging* v. *Adam* (34 Ch. D. 582; S. C. in H. L. 13 Ap. Cas. 308.) When the plaintiff is induced to enter a contract through fraud and sues to have it rescinded, the compensation he is entitled to is not in the nature of damages, as in an action of deceit. He "gets what is the proper consequence in equity of setting aside the contract into which he has been induced to enter." "He is not put back into his old position unless he is relieved from the consequences and obligations which are the result of the contract which is set aside. That is a very different thing from damages." "The indemnity to which he is entitled is only an indemnity against the obligations which he has contracted under the contract which is set aside" (*per* Cotton, L. J., at p. 589).

The measure of compensation.

Cases of purchases and leases of land have some common features as to compensation on rescission which may be noticed. Where a sale of leasehold houses was set aside, and the purchaser had been in possession, an occupation rent was set upon the houses, the purchaser being allowed for lasting repairs and substantial improvements, and he was to be repaid the purchase-money with interest, there being a

set-off, and in taking the account annual rests were directed, so as to apply the excess of the rent above the interest in reduction of the principal of the purchase-money. (*Murray* v. *Palmer*, 2 S. & L. 489; Sugden's V. & P. 214.) Otherwise where the purchaser has simply been in possession, an account of the occupation rent is to be taken without interest, or he is to be charged with such rents and profits only as he has actually received. After the questions ending in rescission have once been moved, a purchaser cannot claim to be allowed for repairs except such as were necessary to the upholding of the premises in common condition. Where a purchaser of a house, the contract of which is rescinded, has converted it from a private house into a shop, he may be compelled at his own expense to reinstate it as a private house. (Sugden's V. & P. 214.) It must be borne in mind that this section is concerned only with the special case of where a defendant, on a decree for rescission of a contract is entitled to compensation. Where there has been a suit for rescission and it is dismissed, very analogous questions to those above indicated may need disposal; but such cases are not within the section, and must be decided under the ordinary rules of practice. So, again, where a purchaser has paid his purchase-money, and has been in possession and dealt with the property as owner, and then succeeds in getting a decree for rescission, on (say) the ground of fraud, difficult questions may arise as to his right of lien for his purchase-money, or his right to follow it into the hands of others; but such a case is not within this section, and must be decided on general principles. (See Sugden's V. & P. 215-6.)

CHAPTER V.

OF THE CANCELLATION OF INSTRUMENTS.

When cancellation may be ordered.

39. Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

If the instrument has been registered under the Indian Registration Act, the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered, and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

Illustrations.

(*a*) A, the owner of a ship, by fraudulently representing her to be seaworthy, induces B, an underwriter, to insure her. B may obtain the cancellation of the policy.

(*b*) A conveys land to B, who bequeaths it to C and dies. Thereupon D gets possession of the land and produces a forged instrument stating that the conveyance was made to B in trust for him. C may obtain the cancellation of the forged instrument.

(*c*) A, representing that the tenants on his land were all at will, sells it to B, and conveys it to him by an instrument dated the 1st January 1877. Soon after that day, A fraudulently grants to C a lease of part of the land dated the 1st October 1876, and procures the lease to be registered under the Indian Registration Act. B may obtain the cancellation of this lease.

(*d*) A agrees to sell and deliver a ship to B, to be paid for by B's acceptances of four bills of exchange, for sums amounting to Rs. 30,000, to be drawn by A on B. The bills are drawn and accepted, but the ship is not delivered according to the agreement. A sues B on one of the bills. B may obtain the cancellation of all the bills.

The ground of this relief.

This form of specific relief is founded upon the administration of a protective justice, for fear (or *quia timet*, to use a technical phrase of English law), either that the instrument may be vexatiously or injuriously used against the plaintiff (whether he is a party to it or not), when the evidence to impeach it may be lost, or that it may now throw a cloud or suspicion over his title or interest. (1 Story's Eq. 694.) As before noticed, its exercise is a matter of judicial discretion. Where an instrument is not merely voidable but utterly void, it might be objected that there is no need for the relief given either by ch. iv or ch. v; and if its nullity is apparent on the face of the instrument, it might be so, as there can then be no damage or danger from its use or existence. One distinction between the two chapters is that the relief under ch. iv is given where the contract is either voidable only, or where its unlawfulness or nullity is not

apparent on its face; but ch. v includes void as well as voidable instruments, and this whether the nullity is apparent or not; but then it adds this important limitation that there should be reasonable ground for apprehension of serious injury from the existence of the instrument. This apprehension (the *quia timet* of English courts) is the basis and test of the jurisdiction, and hence the relief extends to a forged instrument, and this, as I apprehend, whether (subject always to the limitation in the section), the plaintiff is an apparent party thereto or not, and though there has been no prior trial on the point of forgery. (1 Story's Eq. 701.)

Non-apparent and apparent nullity.

Where the illegality or nullity is non-apparent, the relief should always be given; for if an instrument is void, and ought not to be used, it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose. Thus a void bill of exchange may be used in fraud of a third party, a void conveyance may cast a cloud on the true title, or a void contract may be vexatiously litigated at a distant time, when proof of its nullity may be difficult or impossible. On the other hand, where the illegality or nullity is apparent, there can rarely or never be reasonable fear of injury, and clear evidence justifying apprehension should be required. (1 Story's Eq. 700, 700*a*). On "*hard bargains*" being set aside, apart from fraud, see *dicta* in *Srinath K. etc.* v. *Kali, P. G.* (12 Ind. Ap. 225.)

Expired instruments.

There remains the case of an instrument originally valid and unexceptionable, but which, by subsequent events, has become *functum officio* and void. There may be the same danger of injury from the retention of such an instrument, and the same need to decree the delivery up and cancellation of it, as in the case of one void *ab initio*.' (1 Story's Eq. 705.) This relief will apply not only to instruments discharged in their ordinary and intended course, but where it may be fairly inferred from the acts or conduct of the party entitled to the benefit of the instrument, that he has treated it as released, or otherwise dead in point of effect. A striking example of this is an English case, where a father, upon payment of his son's debts, took a bond for the amount from the son: but it appeared that he did this as a sort of a check upon his son's future conduct, and not as a security for himself, to be enforced against the son; and on the father's death his executors were, at the suit of the son, decreed to deliver up the bond to be cancelled.

(*Flower* v. *Martin*, 2 My. & C. 459; 1 Story's Eq. 705*a*.) Another case went even further; for where a testator, on his death-bed, said to his executrix that he had the bond of B, but when he died, B should have it, and that he should not be asked or troubled for it, his executrix was decreed to deliver up the bond to be cancelled. Clearly this transaction was not good as a *donatio mortis causâ*, and it stood upon oral evidence to establish an intention to have the bond delivered up, not touched or provided for by the will. (*Wekett* v. *Raby*, 3 Bro. P. C. 16; 1 Story's Eq. 706; Act X of 1865, s. 178.) In *Bond* v. *Walford* (32 Ch. D. 238) cancellation of a deed of settlement was decreed as the marriage in contemplation of which it had been executed was never carried out.

The Illustrations to s. 39 considered.

Illustrations (*a*) and (*d*) are instances of contracts between the parties to the suit for cancellation; but Illustrations (*b*) and (*c*) are examples of instruments other than contracts, and in neither is the plaintiff an apparent party to the instrument. In Illustration (*b*) there is an alleged deed by plaintiff's predecessor in title which is a mere forgery, and in Illustration (*c*) there is an instrument by way of contract between other parties, which is fraudulently concocted so as, if valid, to defeat the prior title acquired by plaintiff from one of them. In Illustration (*a*) the ship is assumed to be still in existence, and it is therefore uncertain whether the policy will ever be sued upon, for it may expire by the completion of the venture, or by lapse of time. But it may be very easy at once to prove the ship unseaworthy when insured, and yet most difficult to prove it hereafter when the ship is lost. Here rescission is not the proper relief, for though voidable only and not void, the contract is not, as against the plaintiff, yet operative, and may never be so; it is otherwise as to a contract of sale (whether possession has or has not been changed under it), for it operates at once upon the right of ownership, but here the condition, on which alone its operation is to begin, has not, and may never arise; and hence to cancel it, that is, to put on the face of it that it is invalid and can have no operation, is the appropriate relief. This case also illustrates s. 41, as on cancelling the policy, justice requires that the underwriter should return the premium received by him on the policy. In Illustration (*d*) the bills of exchange are void from failure of consideration, and there is also the danger in leaving them in circulation that innocent third parties would acquire rights against

the acceptor; and these two ingredients when combined, make the immediate cancellation of all the bills the appropriate relief.

Plaintiff's interest.—Where the plaintiff who had sold a shop to B and C with a covenant for title, claimed to have a mortgage, on which the defendant had brought an action and obtained a decree against B and C, set aside, and the decree for the enforcement of lien on that mortgage against the shop also set aside, or to have the shop exempted from the effect of that decree, the court held that he could not maintain the suit as he had parted with all his interest before the suit (*Jhuna* v. *Beni Ram*, I. L. R. 9 All. 439).

Undue influence.—Another class of case where the court gives relief under this section is where the execution of instruments has been caused by undue influence. Thus in *Mannu Singh* v. *Umadat Pandé* (I. L. R. 12 All. 523), the court ordered the cancellation of a deed of gift which the plaintiff, an aged Hindu, had executed in favour of his *guru* or spiritual guide. The *onus* was cast on the defendant to show that the transaction was made without undue influence and in good faith, and this the defendant was unable to establish.

Registration Act.—This section was held to contemplate and provide for a suit to have a document cancelled and declared void when the defendant in whose favour it was said to have been executed, obtained an order from the District Registrar under the Registration Act (III of 1877) for its registration, although the plaintiff had appeared before the District Registrar and the Sub-Registrar and denied the genuineness of the document, alleging it to be a forgery. (*Mohima Chunder Dhur* v. *Jugul Kishore Bhuttacharjee*, I. L. R. 7 Cal. 736).

Limitation.—Where a claim though nominally is to have an instrument delivered up and cancelled, is in effect to have it declared ineffectual in respect of the plaintiff's right, and to have his right to property declared, the limitation is as for a suit for a declaratory decree, and Art. 91, Sch. II, of the Limitation Act, does not apply. (*Sobha Pandey* v. *Sahodra Bibi*, I. L. R. 5 All. 322.)

40. When an instrument is evidence of different rights or different obligations, the court may, in a proper case, cancel it in part and allow it to stand for the residue.

What instrument may be partially cancelled.

Illustration.

A draws a bill on B, who indorses it to C, by whom it appears to be indorsed to D, who indorses it to E. C's indorsement is forged. C is entitled to have such indorsement cancelled, leaving the bill to stand in other respects.

The Illustration to s. 40 is taken from a note to Art. 1908, New York Civil Code, where it is also suggested that in rare cases an instrument might be partially valid against a party entitled to cancel it in part.

A contract was entered into between plaintiff and the defendant, by which the plaintiff agreed to cultivate indigo for the defendant for a specified number of years in certain specified lands situated in different villages, with respect to portion of which lands the plaintiff was a sub-tenant only. Subsequently, during the continuance of the contract, the plaintiff lost possession of those lands through his immediate landlord having failed to pay the rent, and in consequence having been ejected therefrom by the owner. In a suit by him under the above circumstances, to have so much of the contract as related to those lands cancelled, on the ground that it had become impossible of performance through no neglect on his part : held that Chap. IV of Act I of 1877, had no application to such a case, but that the plaintiff was entitled to the relief he sought under s. 40 of the Act, inasmuch as the contract was evidence of different obligations, *viz.*,—to cultivate indigo in different villages. (*Inder Pershad Singh* v. *Campbell*, I. L. R. 7 Cal. 474).

41. On adjudging the cancellation of an instrument, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require.

Power to require party for whom instrument is cancelled to make compensation.

In *Rajah Ajit Singh* v. *Rajah Bijai, &c.* (L. R. 11 Ind. Ap. 211) deeds of hypothecation and sale were set aside on the ground of collusion between the grantor's manager and the lender. The cancellation of the deeds was ordered, not on the terms that moneys proved to have been received by the manager should be repaid, but those sums shewn to have been actually paid to the grantor personally, or borrowed by the manager in the course of a prudent management of the estate.

CHAPTER VI.

OF DECLARATORY DECREES.

Discretion of court as to declaration of status or right.

42. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief.

Bar to such declaration.

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

EXPLANATION.—A trustee of property is a 'person interested to deny' a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.

Illustrations.

(*a*) A is lawfully in possession of certain land. The inhabitants of a neighbouring village claim a right of way across the land. A may sue for a declaration that they are not entitled to the right so claimed.

(*b*) A bequeaths his property to B, C and D, 'to be equally divided amongst all and each of them, if living at the time of my death, then amongst their surviving children.' No such children are in existence. In a suit against A's executor, the court may declare whether B, C and D took the property absolutely, or only for their lives, and it may also declare the interests of the children before their rights are vested.

(*c*) A covenants that if he should at any time be entitled to property exceeding one lakh of rupees, he will settle it upon certain trusts. Before any such property accrues, or any persons entitled under the trusts are ascertained, he institutes a suit to obtain a declaration that the covenant is void for uncertainty. The court may make the declaration.

(*d*) A alienates to B property in which A has merely a life-interest. The alienation is invalid as against C, who is entitled as reversioner.

The court may, in a suit by C against A and B, declare that C is so entitled.

(*e*) The widow of a sonless Hindu alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property if he survive her, may, in a suit against the alienee, obtain a declaration that the alienation was made without legal necessity and was therefore void beyond the widow's lifetime.

(*f*) A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid.

(*g*) A is in possession of certain property. B, alleging that he is the owner of the property, requires A to deliver it to him. A may obtain a declaration of his right to hold the property.

(*h*) A bequeaths property to B for his life, with remainder to B's wife and her children, if any, by B, but if B die without any wife or children, to C. B has a putative wife, D, and children, but C denies that B and D were ever lawfully married. D and her children may, in B's lifetime, institute a suit against C and obtain therein a declaration that they are truly the wife and children of B.

Former procedure in England and India.

The provisions of this chapter have been suggested more by Scotch than by English practice. In English courts of equity decrees were frequently prefaced by declarations of rights, or title, or of matters of fact introductory to the relief about to be decreed; but it was not the practice of the court in ordinary suits to make a declaration of right except as introductory to relief. (1 Seton, 23.) The rule that a civil court may make a declaratory decree without consequential relief was first enacted in a statutory form in 15 and 16 Vict., c. 86, s. 50. That section was re-enacted in India for the old Supreme Courts in s. 29, Act VI of 1854. It was then reproduced in the same form as s. 15 of the old Code of Civil Procedure, which closely followed the words of the English enactment, and was passed to meet this defect: (*Kalidhan Chatterjee* v. *Shib Nath Chatterjee*, 11 C. L. R. at p. 80); but it cannot be said that the result, either in India or England, was very satisfactory. For a case under the old procedure see *Isri Dutt Koer* v. *Mussamut Hansbutti K.* (L. R. 10 Ind. Ap. 150.) The presumptive heir sought a declaration that an alienation by the Hindu widow who held the life-estate was invalid. The suit was held to be clearly maintainable. *A fortiori* would it be so

under this Act. In England the result of the cases was a somewhat narrow construction of the enactment (*Cox* v. *Barker*, 3 Ch. D. 370); and in India the terms, though perhaps more beneficially interpreted, were found, from their vagueness, liable to be abused for litigious purposes. The general principle laid down by the Privy Council in the old cases was that a declaratory decree ought not to be made unless there is a right to some consequential relief which, if asked for, might have been given by the court, or unless in certain circumstances a declaration of right is required as a step to relief in some other court. (*Kathama N.* v. *Doralinga Tever*, L. R. 2 Ind. Ap. 169; *Sheo Singh Rai* v. *Mussamut Dakho*, L. R. 5 Ind. Ap. 87; *Sreenarain Mitter* v. *Sreemutty Kishen Soondery Dassee*, L. R. Ind. Ap. Sup. 149; *Sadut Ali Khan* v. *Khajeh Abdool Gunnee*, *ibid*, 165.) This is certainly now too narrow as a general statement of the right to this form of relief.

In a case where a *talukdar* died leaving a widow and a son, and the latter having succeeded his father and died childless, his widow being in possession, sued for a declaration that an adoption by the father's widow to the father was void, the Privy Council followed the ruling in *Sreenarain Mitter* v. *Kishen Soondery Dassee* (L. R. I. A. Sup. Vol. 149), and approved of the refusal by the High Court of such a declaration, inasmuch as the ground of suit was that at some time or other after the death of the plaintiff the person alleging himself as having been adopted might obtain the *talukdari* unless his adoption was at once negatived. As the plaintiff had no right which was affected by the adoption, she was not entitled to sue for a declaration that the adoption was invalid. Their Lordships were of opinion that if the person alleged to be adopted should subsequently sue, the question of the validity of his adoption would then be decided. (*Pirthi Pal Kunwar* v. *Guman Kunwar*, I. L. R. 17 Cal. 933; L. R. 17 I. A. 107.) In a recent case where the plaintiff as executor of W sued *inter alia* for a declaration that he was entitled to a preferential dividend, should there be a surplus appropriable to such a dividend, the court held that he was entitled to the declaration asked for. The objection was taken for the first time in appeal that the suit was not maintainable because the plaintiff asked merely for a declaration of a right to a dividend which might never exist, and the court held that even apart from the plaintiff's right to the declaration asked for, it was fatal to the objection that it was first raised at that time. (*Bombay-Burma*

Trading Co. v. *Yorke Smith*, I. L. R. 17 Bom. 197.) Where plaintiff sued in a Civil Court to cancel a *patta* which he alleged was incorrectly and fraudulently antedated by the defendant with the object of preventing the plaintiff from taking steps to cancel it in a revenue court, a copy of the *patta* having been affixed to plaintiff's house, the court held that the suit was not maintainable. The plaintiff never asked that a proper *patta* should be given him, in which case he would have had a cause of action, nor did he allege that the affixing of the copy on his house caused him any harm; he merely wanted to have it cancelled lest it should be used as evidence against him at some future occasion. The court held that the affixing of the copy did not amount to more than a mere assertion on the part of the defendant and gave rise to no cause of action. (*Nurdin* v. *Alavudin*, I. L. R. 12 Mad. 134.) In a recent case in which many of the older authorities were fully considered, the facts were as follows: M died leaving two widows, one of whom died shortly after him leaving a son. The surviving widow and the grandson of the deceased executed mutual deeds by which the former relinquished her life interest in the properties inherited, and the latter conveyed to her an absolute right in one-half of the properties. The grandson died subsequent to the execution of these conveyances, leaving a widow N who came into possession of her husband's half share. The plaintiff as next reversionary heir of M sued for a declaration that the deeds were invalid and did not affect him, and it was held that the suit was maintainable in the lifetime of the widow. (*Hem Chunder Sanyal* v. *Sarnamoyi Debi*, I. L. R. 22 Cal. 354.)

The object of this section is to express in definite terms the kind of cases in which the specific relief of a declaration of right, apart from all further relief, may be granted. In *Chokalinga Peshana Naicker* v. *Achiyar* (I. L. R. 1 Mad. 40) it was also stated to be "to avoid a multiplicity of suits, and to prevent a person getting a declaration of right in one suit and immediately after the remedy, already available, in another." This seems but the natural meaning of the proviso of the section, which refers to the status of the plaintiff at the time of filing his suit. Where the immediate reversioner to the estate of a Hindu widow sued for a declaration that certain alienations made by the latter to two grantees were invalid, and the suit being dismissed, the plaintiff preferred an appeal, and in the *interim* one of the widows died, it was held that he could continue with his appeal. But the court refused to allow him to amend his plaint and claim possession,

(*Govinda* v. *Perumdevi*, I. L. R. 12 Mad. 136.) The Legislature intended by this section that the court might grant to a plaintiff the relief granted by the Court of Chancery in cases where no relief at common law was available. When a proprietor's title was in danger, and he could not bring an action at common law to try the question of title, the Court of Chancery would give him this indirect form of relief, the more direct kind not being open to him. A mere declaration was never granted except upon this condition. So where a widow of a joint Hindu family was allowed by the other members to have her name recorded in her husband's place in respect of his rights and interests in the family property by way of compliment to her, and they consented that in lieu of maintenance she should receive the profits of the property during her lifetime, and she subsequently executed a deed of mortgage of the property, which did not specifically state the amount of the property mortgaged and also a bond, upon which the obligee obtained a decree and attached part of the property recorded in the name of the obligor. It was held that if the widow's possession were only a possession by the plaintiff's consent, entitling her merely to receive the profits of her maintenance, the other members of the joint family could not obtain a declaration that the mortgage executed by the widow was invalid, and that the property was not liable to attachment under it, nor to attachment in execution of the decree upon the bond. Before relief could be granted under this section they must have sought their relief by ejectment. (*Bholai* v. *Kali*, I. L. R. 8 All. 70.)

Besides the power of making declarations of right due to express legislation, the English courts of equity were sometimes able to attain the same end as would have been substantially served by a declaration of right, by other processes, such as bills *quia timet*, bills of peace, bills to perpetuate testimony, or to take it *de bene esse*, and so on. It would be instructive, but tedious, to trace how far these processes agreed with, or differed from, the relief provided by this section. Such a case for instance, as that put in Illustration (*a*) would have been a proper subject-matter for a bill of peace, though the declaration of the right would probably have been followed by a perpetual injunction, as indeed it might be now in our courts, as is shown by Illustration (*p*) to s. 54. Some of the above processes were otherwise open to much evil, especially in regard to the taking of evidence, this being due partly to procedure and partly to the severance of law and equity in

the courts; but despite these drawbacks, they did good service in their day. The following are some of the leading principles governing the use of the Scotch action of declarator. Declaratory actions are designed for the purpose of making that clear which is at present doubtful, and which it is necessary to make clear. They are not intended to establish truisms. In such actions some right is craved to be declared in favour of the pursuer, but nothing is sought to be paid or performed by the defender. Decrees upon such actions confer no new right; they only declare what was the pursuer's right before. The court will not entertain declarator of an abstract fact, where the pursuer cannot show a consequent right which he has an interest to establish. Even where there is a right sought to be declared, the court will not declare it if it is not disputed. It will not declare a right by anticipation before the facts on which it depends emerge. But where a right, future and even presumptive, is disputed, and there is a proper contradictor, a declarator will be sustained. Thus, declarator is the appropriate action to determine a disputed question of vesting, where there is no fund *in medio*, but only *in spe*; and where the validity of a provision payable only on the occurrence of a future event was disputed, declarator was held competent. It has been questioned whether there may be a declarator to ascertain the meaning of a statute; but it would seem that there may be where the proposition to be declared applies to a particular concrete subject. This form of action is also used in Scotland for other purposes than those comprised in ch. vi. (2 Mackay's Practice of the Court of Session, pp. 93—100, is by far the best description of the action; see also Erskine's Principles (ed. 1870), 555.) Certain trusts of a house were declared in favour of A and B for life, subject to forfeiture upon the happening of particular events, and further trusts in favour of the issue of A and B were also declared. The settlor died leaving a will under which C took an estate for life with remainder to the settlor's son E absolutely. E assigned his interest in the trust premises to the plaintiff, who now sued the *cestuis que trustent*, and C, praying that in the events that had happened, it might be declared that the life estates of A and B had been forfeited. He also asked for various declarations as to his rights. In holding that no declaratory decree could be made, it was said that it could not have been the intention of the Legislature to lay it down as a rule that any

Scotch action of declarator.

one who claims any interest in property present or future ought to be allowed to ask the court to give him an opinion on his title. (*Bhugendro Bhusan Chatterjee* v. *Trigunanath Mukerji*, I. L. R. 8 Cal. 761.)

The section refers to declarations as against the parties to the suit, not to declarations of abstract right, or bare declarations of trust, exclusive of any practical equity. (*Muzhur Hossein* v. *Dinobundo Sen*, Bourke, O. C. 8; Cor. 94.)

To entitle a plaintiff to ask for relief, there must be some alleged hostility on the part of the defendant. (*Promotho Nath Ghose* v. *Jadoo Nath Sen*, 1 Ind. Jur. N. S. 293; *Ram Khilawan Singh* v. *Oudh Koer*, 21 W. R. 101.) And such hostility should be existent antecedent to the filing of the plaint, otherwise there would be no cause of action even though the written statement were hostile. (*Per* Jackson, J., in *Colvin Cowie* v. *Elias*, 2 B. L. R. A. C. 212; 11 W. R. 40.) A court will not entertain a suit for a declaration that the decree of a subordinate court was passed fraudulently as having been obtained by the defendant bribing the judge. The proper remedy would be by staying the execution of the decree by injunction. (*Kunhamed* v. *Kutti*, I. L. R. 14 Mad. 167.) So where a person purchased property at an execution-sale, and the sale was improperly set aside, and he sued to have the order setting aside the sale quashed, and for a declaration that the sale was valid, it was held that though looking at s. 42 alone such a suit might be maintainable under the section, the plaintiff's proper remedy was under ss. 278 and 283 of the Code of Civil Procedure. (*Mar Kuar* v. *Tara Singh*, I. L. R. 8 All. 583.) The Civil Courts have no jurisdiction to make a decree reversing an order for the registration of the name of any person made by a registering officer under Bengal Act VII of 1876. All that the court can do is to declare the title of an individual or to give him a decree for possession, and then the registration officers would amend their registers in accordance with the rights of the parties as settled by the Civil Court. If the result of the registration proceedings was to put plaintiff out of possession, he could not sue under this section. (*Omrunissa Bibee* v. *Dilwar Ally Khan*, I. L. R. 10 Cal. 350.)

Essentials to the relief.

A declaratory decree may relate, either (1) to some legal character, or (2) to some right in property. By legal character is meant what is ordinarily and in the marginal note termed legal *status*, such as legitimacy, marriage, divorce, adoption, and so on. The cases put in

Illustrations (*f*) and (*h*), and in the Illustration to s. 43, are examples of *status*. The other Illustrations are examples of rights in, or as to, property. To found a suit for a declaratory decree of either of these two kinds, three things seem to be essential: *firstly*, there must be a present existing interest, however distant the possibility of its coming into actual possession and enjoyment may be. A mere contingency, however proximate and valuable, if by virtue of it there is no present estate or interest, will not suffice, as in the case of the heir of a lunatic. *Secondly*, there must be some present danger or detriment to such interest to be averted by the declaration; that is, the declaration must not be sought on purely speculative grounds. (See 2 Story's Eq. 1511.) A *third* essential is embodied in the proviso to the section, namely, that a man, who is at the time entitled (if at all) to an executory decree, cannot seek only a declaratory decree.

The Illustrations examined.

If we examine the Illustrations to this section, we shall, I think, find present in all of them the above essential ingredients to a suit for a declaratory decree. Whether the interest to be defended or assailed be one of *status*, or of right as to property, it is a present existing one, and the declaration is necessary to remove or avert a present existing damage or risk to such interest; and in none is the plaintiff presently entitled to any further relief. This is obviously so in Illustrations (*a*) and (*d*). The plaintiff must show that there is some relief which the court is able to give. (*Baij Nath Chatterjee* v. *Lakhi Mani Debi*, 5 B. L. R. 514 note.) He should show some consequential relief, which, if asked for, might have been given by the court unless he requires the declaration as a step to relief in some other court. (*Sheo Singh Rai* v. *Dakkho*, I. L. R. 1 All. 68; *Ram Bharose Lal* v. *Gopi Bibi*, 7 N. W. 300.) He must have some *legal character* or *status;* this he must have asserted in some form or another, and there must be an impugning of his title. The court found none of these essentials present in a case where a person brought a suit against a defendant who was in possession of certain property, praying for a declaration that it was *wakf*. His only interest in the property being that he was a Muhammadan, the court found that he had no *locus standi* and that his suit was not maintainable. (*Wajid Ali Shah* v. *Dianat-ul-lah Beg*, I. L. R. 8 All. 31.) Where the plaintiffs sued for a declaration

The Illustrations (*a*) and (*d*).

that they, as managers of a *ghat*, were entitled to one-third of the donations given by the pilgrims, and that the defendants were not entitled thereto as sole owners, and for consequential relief, the court dismissed their suit on the ground that even if the evidence showed they had some rights in the *ghat*, they had failed to prove the particular rights they alleged or their title to the particular relief claimed. (*Mania* v. *Brijmohun*, 17 I. A. 187; I. L. R. 12 All. 587; see also *Shah Muhamad* v. *Kashi Das* (I. L. R. 7 All. 199), where under similar circumstances the court refused relief in the absence of proof of any particular acts of trespass.) A case analogous to Illustration (*a*), in which there was a want of some of these essential ingredients, is an old one (L. R. 2 Ind. Ap. 83), where a zemindar sued a number of his tenants, who, he alleged, asserted that they held under a certain tenure, the consequences of which he wished to avoid by means of a declaration of his rights. Here his existing rights in respect to possession were not being hurt or endangered, as he was receiving the rents and profits, and could obtain no other description of possession than that which he had. In Illustration (*a*) it is obviously quite different, as the exercise of the alleged right of way must be a continual violation of the possession. Then the consequence of the asserted tenure, the non-liability to enhancement of rent, was a matter within the cognizance of another and special court. And lastly, the false title alleged to have been asserted was not based on any document, when he might have had the relief of having it cancelled. The real object of his suit was, by a side wind, to smooth his path for proceedings in the revenue courts for enhancement of rent, and that relief, if he was entitled to it, he was bound to seek directly. An analogous case was that of *Sheobaran* v. *Bhairo Prasad* (I. L. R. 8 All. 880), where the plaintiff sought to obtain a declaration of the existence of a custom whereby he as landlord could take the ryot's lands for cultivating indigo. The court rejected his suit as his real object was to eject the occupancy ryot. In the case in Illustration (*a*) A could sue any one of the public who formally claimed to use his land as a public road. To such a suit it would not be necessary to make the Secretary of State a party. (*Chuni Lall* v. *Ramkishen Sahu*, I. L. R. 15 Cal. 460.) A person whose property is sold in execution of a decree against a third party is not bound to wait till he is dispossessed by the auction-purchaser. He is entitled to bring his suit as soon as his title is denied, and the execution-sale would give him a cause of action. (*Shivram Chintaman* v. *Jivu*,

I. L. R. 13 Bom. 34.) A reversioner is entitled to sue to set aside an adoption without proof of fraud on the part of reversioners less remote than himself. The nearer reversioners would be legitimate parties to such a suit. (*Gurulingaswami* v. *Ramalakshmamma*, I. L. R. 18 Mad. 53.) It is open to a landlord, when his title is in jeopardy from the aggressions of a neighbouring zemindar, and when his title may be damaged by a denial of his rights over his land, to bring a suit for the purpose of having his rights declared as against such wrong-doer, and for the purpose of being put into possession of the land as against him. (*Bissessuri Dabeea* v. *Baroda Kanta Roy Chowdhry*, I. L. R. 10 Cal. 1076.) A suit would lie by a person against a Municipal Committee for a declaration of his right to establish a market on particular land when such Municipal Committee had rejected his application for leave to establish the market. (*Brij Mohan Singh* v. *Collector of Allahabad*, I. L. R. 4 All. 102.)

The converse case of Illustration (*a*) is where a person being in possession denies the right of the public,—any of whom might sue for a declaration. Somewhat analogous to this is the case of *Kalidas Jivram* v. *Gor Parjaram Hirji* (I. L. R. 15 Bom. 309), where the plaintiffs had been in the habit of conducting pilgrims to a certain temple and of worshipping therein on their behalf. The defendants, the resident priests, suddenly prohibited the public from entering the most sacred portion of the temple without the payment of a fee. The court was of opinion that the plaintiffs were entitled to a decree declaring their right to free access. Where the assertion was contested, a plaintiff could sue for a declaration of his right to officiate at particular times as a priest at a shrine and to receive the offerings made by the worshippers there. (*Limba bin Krishna* v. *Rama bin Pimplu*, I. L. R. 13 Bom. 548.) Where a District Temple Committee had ordered the removal of the plaintiffs from the trusteeship of the temple, the court held that the plaintiffs could sue for a declaration that the act of the Committee was unlawful. (*Ramanuja* v. *Devanayaka*, I. L. R. 8 Mad. 361.)

As in Illustration (*d*), there must be a present injury or danger to the reversioner, to justify a declaration of his right. The mere quieting of a doubtful title is not a sufficient reason for a declaration of title; such a principle, as was pointed out in an old case (L. R. 2 Ind. Ap. 169; 6 Mad. H. C. 310), if acted upon, would open the door to the determination of future interests whenever one party chose to think it desirable that a dispute as to title, which might at

any time afterwards crop up, should be determined by a declaratory decree. (See also *Bholai* v. *Kali*, I. L. R. 8 All. 70.) A person having a vested remainder immediately after a life estate is entitled under this section to maintain a suit to have it declared that a deed of gift executed by the life-tenant is invalid beyond the life of the grantor. (*Anant Bahadur Sing* v. *Raghunath Koer*, I. L. R. 8 Cal. 769; 11 C. L. R. 159.) The mere possibility of succeeding to the estate held by a widow for life does not confer, on the person having it, the right to sue to contest an adoption alleged to have been made by the widow. Such a suit must be brought either by the presumptive heir, or, in the case of his refusal to sue, or precluding himself by act or word from suing or of his concurring in or colluding with the alleged adoption, by the next reversioner. In the latter case, the plaint must state why the presumptive heir does not sue, and the court will, in the exercise of its discretion, decide whether the plaintiff is competent to sue. (*Gyanendro Nath Roy* v. *Lobongomunjori Dabi & others*), 11 C. L. R. 198; see also *Raghunath* v. *Thakuri*, I. L. R. 4 All. 16.)

Illustration (*b*).

In Illustration (*b*) B, C and D have a present existing interest in the property bequeathed to them; but it is uncertain whether their children, who have not yet come into existence, have any or what rights in the same. There will be an obvious detriment to B, C and D's interests by the uncertain and restricted enjoyment of the property which they would otherwise have, unless they obtain a declaration of their rights. Though the children have not come into existence, a declaration of the rights of the children (if any) is an essential and unavoidable condition of a declaration of the rights existing at the time in B, C and D; but it does not follow that the court will go on to declare the rights of the children further than is essential to fix the rights of B, C and D; thus we might suppose a case in which the rights of the children *inter se* might be left undetermined. (*Greenwood* v. *Sutherland*, 10 Hare, App. XII; *Kevan* v. *Crawford*, 6 Ch. D. 42.) In a case where plaintiff sought, under this section, to stay a partition ordered by the Collector under Act VIII of 1876 (B. C.) on the ground that a private partition had already been effected, the court held that the plaintiff must shew both that there had been a private partition and that he was in possession of a divided portion of the property in severalty under the partition, and that even if he

established these facts the declaratory decree would be limited to his divided rights. (*Kalup Nath Singh* v. *Lala Ramdein Lal*, I. L. R. 16 Cal. 117.) A declaratory decree could be made as to the future profits of a company which would go to form a dividend. In that case the court found that the right existed, although the exercise of the right might depend upon the fact whether there were or were not ultimately any profits to appropriate. (*Bombay-Burma T. Co., Ld.* v. *F. Yorke Smith*, I. L. R. 17 Bom. 197.) Where the only object of a declaratory suit was to prevent the defendant, who claimed property under an alleged adoption and alienation, from obtaining possession after the plaintiff's death, the suit was held to have been properly dismissed. (*Rani Pirthi P. K.* v. *Rani Guman K.*, L. R. 17 Ind. Ap. 107.)

The limitation to all suits in which a declaration of the invalidity of an alleged adoption is invoked is regulated by Art. 129, Act IX of 1871, Sch. II. (*Jagadamba C.* v. *Dakhina M.*, L. R. 13 Ind. Ap. 84.)

Generally, it would seem that as to the interests of persons not *in esse*, where the declaration is not unavoidable, it ought to be for their benefit that a declaration should be made; thus, if the decision of the question be one way, it would be so, but if the other way, it would be prejudicial to some of such persons, not *in esse*, the court will leave it undecided, and if in the course of events the question should need decision, it will then (it has been said) be open to such persons to take advantage of the doubt to attain an equitable arrangement. (*Bright* v. *Tyndall*, 4 Ch. D. 189.) Where from the frame of the suit, the declaration could not bind hereafter the person not yet in existence, none will be made. (L. R. Ind. Ap. Sup. 149; L. R. 8 Ind. Ap. at p. 64.) And where, as between the plaintiffs and a reversioner, a declaration on such a subject as a falsely alleged will has to be and is made, it does not follow that the court will go on to declare the rights of the plaintiffs (as an adopted son and his mother) *inter se*. (L. R. 5 Ind. Ap. 87; see also L. R. 8 Ind. Ap. 215.) But where the court, in the case of a peculiar will, had to declare that there was a valid limitation of a life estate in favour of one person, it went on to make a declaration of the future rights of the parties subject to such prior life interest, "because," as the court said, "all the existing parties interested are in court, and it is impossible to decide the case without considering the whole scope of the will, and arriving at judicial conclusions as to the rights of each of the parties thereunder, which judicial

conclusions, so far as they dispose, or may dispose of the rights of those parties, ought to be incorporated in the decree." (*The Tagore case*, L. R. Ind. Ap. Sup. 84.) So in *Curtis* v. *Sheffield* (21 Ch. D. 4) the general principle was stated that it is not the practice to decide as to future rights, but to wait until the event has happened, unless a present right depends on the decision, or there are some other special circumstances to satisfy the court that it is desirable at once to decide on the future rights. But where all the parties who in any event will be entitled to the property are of age and are ready to argue the case, the reason of the rule departs, and it becomes a bare technicality. When all are of age and every possible party is represented before the court, utility seems to say that there should be a power to determine their rights, as is the case in Scotland and in many other countries.

Illustration (*e*).

Again, in Illustration (*e*), though the property has not accrued nor the persons been ascertained, the obligation created by A's covenant is an existing interest, and the detriment is that the existence of such obligation prevents A from exercising the present power of dealing as he might otherwise do, with any contingent or expectant interest in property to which such covenant might by possibility hereafter relate, when it accrued or became vested. It is assumed that no further relief is necessary; there is no mistake, or fraud, or like ground, that would justify the rescission or rectification of the settlement, but merely an uncertainty as to one covenant, and a declaration of its being void for uncertainty will be an ample relief, leaving the rest of the deed to stand.

Illustrations (*d*) and (*e*) compared.

The distinction, if any, between Illustration (*d*) and Illustration (*e*) seems to be this; in Illustration (*d*) the reversioner is one whose interest is apparent and indefeasible, so that the property must, on the determination of the particular estate, pass to him or his representative, as in the case of an English tenant in remainder in fee; but in Illustration (*e*) the reversioner is one whose interest, though also present and existing, is not indefeasible, but presumptive, on (amongst other things) his personally surviving the tenant for life. In each Illustration the act sought to be impeached by a declaratory decree is an act of alienation by the tenant for life; and in each the declaration is, in substance, that such act is invalid beyond the lifetime of the tenant for life. The immediate reversioners could sue any person who held possession adversely to the life-tenant. (*Adideo Narain Singh* v.

Dhukara Singh, I. L. R. 5 All. 532.) Nor would it defeat a reversioner's right to sue for a declaration of his interest if two life estates intervened in such a case. (*Kandasami* v. *Akhammal*, I. L. R. 13 Mad. 195.) In Illustration (*d*) it would be immaterial if in form also the declaration were so made; but in Illustration (*e*) the form of the declaration must necessarily be such, since the reversioner is only presumptively entitled; but it is entirely erroneous to say—as has been said in some reported decisions in India (see 6 Ind. Jur. 192, 7 Mad. H. C. 351, and other cases) either that such a reversioner has only a contingent right or interest, or that such a suit by him is for a declaration of his reversionary right. A gift in remainder expectant upon the termination of a life estate is accelerated and not destroyed by reason of the gift of the life estate being void. (*Ajudhia Buksh* v. *Mussamut Rukhim, etc.*, L. R. 11 Ind. Ap. 1; in which *Lawson* v. *Lawson* (5 D. M. & G. 754) was approved).

Vested and contingent interests distinguished.

It is elementary learning that a vested remainder or quasi-remainder is a future interest capable of taking effect in possession or enjoyment at once upon the determination of the prior interest, without regard to any other occurrence; whilst a contingent remainder or quasi-remainder does not so take effect, without also the concurrence of some collateral contingency. (Smith's Comp. 235.) It is obvious, therefore, that a reversioner who will succeed to the possession of property on the death of a Hindu widow, if he survives her, has a vested and not a contingent interest, whether we call it a reversion or a remainder being quite immaterial; and it is erroneous to suppose that the condition of his surviving her makes his interest a contingent one. A vested remainder is none the less such because it may be liable to be divested, as by the widow making a valid adoption, or by the remainderman's own death before the estate comes into possession. Whatever the value of the interest, yet if it is ready from the first, and, so long as it lasts, continues ready to come into possession, whenever the widow's estate may happen to determine, it is a vested, and not a contingent interest.

In speaking of the nature and extent of a widow's estate under Hindu law, Mr. Mayne says (p. 671, 4th Edn.): "Hindu law knows nothing of estates for life, or in tail, or in fee. It measures estates not by duration but by use. The restrictions upon the use of an estate inherited by a woman are similar in kind to those which

limit the powers of a male holder, but different in degree. The distinctive feature of the estate is that at her death it reverts to the heirs of the last male owner. She never becomes a fresh stock of descent" (§ 561); and again at p. 690 (§ 578) he says, "the nature of a woman's estate must, as already stated, be described by the restrictions which are put upon it, and not by the term of duration. It is not a life estate, because under certain circumstances she can give an absolute and complete title. Nor is it in any sense an estate held in trust for reversioners. Within the limits imposed upon her, the female holder has the most absolute power of enjoyment. She is accountable to no one, and fully represents the estate, and so long as she is alive, no one has any vested interest in the succession. On the other hand, the limitations upon her estate are the very substance of its nature, and not merely imposed upon her for the benefit of reversioners. They exist as fully if there are no heirs to take after her as if there were. Acts which would be unlawful as against heirs expectant are equally invalid as against the *sovereign* claiming by escheat." He then cites *Collector of Masulipatam* v. *Cavaly Vencata*, 8 Moore's Ind. Ap. 529, 550. This case supports the latter part of the remarks, but not the former. The power to give an absolute title to another under certain circumstances does necessarily prevent the estate being only a life interest. This power is exerciseable only for the benefit, not of the widow, but of the former owner of the estate. It is quite certain that a Hindu widow has not an estate of inheritance; she has not the whole of the *dominium*. What is not in her must be in some one else, unless it is possible for the inheritance to be in abeyance, and Mr. Mayne often admits that this is not possible in Hindu law. The truth is, that what is not in the widow is in the male heirs of the husband, subject only that it is divested by their death before the estate comes into possession. Again, at p. 706 (§ 592), Mr. Mayne says: "It must be remembered that where an estate is held by a female, no one has a vested interest in the succession. Of several persons then living one may be the next heir in the sense that, if he lives, he will take at her death in preference to any one else then in existence. But his claim may pass away by his own death, or be defeated by the birth or adoption of one who would be nearer than himself. It certainly does seem to be common sense that the person who turns out to be the actual reversioner, should not find his rights signed away by the consent of one, who, when he consented, had a

preferable title in expectation, but who, in the actual event, proved to have no title at all." And he suggests that an alienation by a widow should have the consent of all possible heirs then living. This seems clearly wrong. Besides, how can a man be rightly termed "a reversioner" and yet have no estate at all in him? On this point the remarks made in the case of *Hem Chunder Sanyal* v. *Sarnamayi Debi* (I. L. R. 22 Cal. 354) are of great instruction. "Two propositions appear to us to be well established," say their Lordships at p. 361. "First, the widow may relinquish the whole of her interest in her husband's estate, and then the next reversioner will acquire the estate absolutely. The reason of this is that it is the intervention of the widow that postpones the succession of the reversioner, and if she walks out of the scene, she thereby anticipates for the reversioner the time of his succession. This view, which is quite in accordance with the reason, is amply supported by the authority of decided cases. (See *Shama Soondaree* v. *Shurut Chunder Dutt*, 8. W. R. 500; *Protap Chunder Roy Chowdhry* v. *Joymonee Dabee Chowdhrain*, 1 W. R. 98; and *Behari Lal* v. *Madho Lal*, I. L. R. 19 Cal. 236.) Second, the widow may convey to the next reversioner, or to a third party with the consent of the reversioner, the whole or any portion of the estate, and the transferee will acquire an absolute interest. The second proposition, though amply supported by the authority of decided cases (see *Nobokishore Sarma Roy* v. *Harinath Sarma Roy*, and the cases there cited), is not, it must be owned, reconcileable in its broad generality with the strict principle of Hindu law, as laid down by the original authorities. According to that principle, the reversioner, after a Hindu widow, is the person who is the nearest heir to her deceased husband at the date of her death. And if by death we understand civil death or renunciation of the world or relinquishment of worldly interests as well as natural death, the first of the above two propositions will not conflict with the foregoing principle. But before the event, which is to determine the actual reversioner, namely, the cessation of the widow's estate by death or relinquishment, happens, no contingent reversioner can say that the estate will rest in him; and it is not easy to understand on what principle the widow, by making an alienation (not in the nature of a relinquishment of her estate) either in favour of the next presumptive reversioner, or in favour of a third party, with the consent of such presumptive reversioner, can affect the rights of the actual reversioner when the succession opens to him."

True *causa petendi* in a declaratory suit.

Next, it is equally obvious that a suit such as that in Illustration (*e*) or (*f*) can, only by confusion of language, be spoken of as a suit for the declaration of the plaintiff's reversionary interest. A presumptive reversioner may sue for a declaration as to the invalidity of an adoption, or of an alienation, by the life-tenant, but such a suit may or may not require a decision upon his reversionary right; for it may be not questioned, or, though not admitted, the defence may be that anyhow the adoption or alienation was valid: and, even if it be incidentally decided, and though it is always incidentally involved, the true *causa petendi* in the suit, as well as any declaratory decree if made, is, both in form and substance, as to the validity or otherwise of the act sought to be impeached by the plaintiff; though, of course, such a suit, like any other, may go off on some preliminary ground, as that the plaintiff is not the presumptive reversioner, or is otherwise not entitled to sue. The frequency with which the above two errors have led to confusion in cases in India, must excuse this rather elementary discussion. It follows that a reversioner cannot, *ex mero motu*, sue for a declaration of his interest, nor can two or more contending reversioners be allowed to convert a suit, otherwise well brought, into an occasion for a decision upon their conflicting rights *inter se*.

Illustration (*e*).

In Illustration (*e*) we must remember that a present interest, the enjoyment of which may depend upon the most remote and improbable incidence, as, for instance, let us suppose here, the chance that an old man of seventy will survive a young widow of twenty, is, nevertheless, a present estate, although with reference to the chances, it may be worth little or nothing. (2 Story's Eq. 1511.) Hence, here the person presumptively entitled has a present interest sufficient to entitle him to sue in order to avert the danger to the future enjoyment of such interest by the detrimental act of alienation without legal necessity. Indeed, in cases of this kind, the more valuable the interest which the widow has to alienate, that is, the better the chance of her life, and the more remote the probability of the presumptive reversion coming into possession, the greater the need for a present declaration of right, lest, by the lapse of time, all trace of the real character of the transaction should be lost. In cases of this kind the distinction (as already suggested) is between an interest that has arisen (whether absolute or presumptive, however future and remote), and one as to which there

is only a possibility that an event, upon which it is made to hang, may hereafter occur. The latter is not an interest, it is not a right; it is nothing more than a bare expectation of a future right. The expectation of a future interest, or rather of a future event that may give an interest, is not a thing which would justify a court in entertaining a suit at the instance of a party having that and nothing more. (*Davis* v. *Angel*, 4 D. F. & J. 524.) It was apparently on this principle that the case of *Griwan Singh* v. *Asharu Lall Singh* (9 C. L. R. 249, reported as *Greeman Singh* v. *Wahari Lall Singh* in I. L. R. 8 Cal. 12) was decided. There, A, claiming as the son of the daughter of B, to be his heir, sought to set aside alienations made by the widow of B, and to have it declared that, on the death of the surviving widow, he would be entitled to succeed to B's estate. The court refused him relief on the ground that he was not entitled to maintain a suit for the declaration prayed for as presumptive heir on the death of the widow. "Section 42," remarked the court, "refers only to existing and vested interests, and not to contingent rights like those of a person who has only a chance of succeeding to the estate of a Hindu after the death of a female heir in possession." But the Madras Court adopted a contrary view and dissented from this decision. In the Madras case, the plaintiffs, uncle's sons of R, a deceased Hindu, brought a suit as reversioners of R, for a declaration that certain alienations made by M, the widow of R, were not binding beyond the lifetime of M, and the court decreed the plaintiff's suit, giving him the declaration he sought. (*Gangayya* v. *Mahalakshmi*, I. L. R. 10 Mad. 90.)

In cases such as those given in Illustrations (*e*) and (*f*) it has been laid down by the Privy Council that, as a general rule, the suit must be brought by the presumptive reversionary heir, that is to say, by the person who would succeed if the widow were to die at the moment. It might be brought by a more distant reversioner if those nearer in succession are in collusion with the widow, have concurred in her act, or have precluded themselves from interfering, or refuse without sufficient cause to institute proceedings. In such a case, the facts justifying the distant reversioner's suit ought to be set out, and, probably, the nearer reversioner ought to be made a party to the suit. It cannot be the law that any one who may have a possibility of succeeding on the death of the widow can maintain the suit, for, if so, the right to sue would belong to every one in the line of succession, however remote. (L. R. 8 Ind. Ap. 14; Moore's Ind. Ap. 193; L. R.

5 Ind. Ap. 149.) A declaration could be obtained that an attempt to restrain alienation was a void condition of a gift. (*In re Dugdale*, 38 Ch. D. 176, 183.) The Privy Council made a declaration against a widow in possession in favour of a widow entitled for life in remainder, and also in favour of the remainderman, subject to their life estates, holding that although declaratory relief might have been reasonably refused to him, as a remote remainderman, in a second declaratory suit, yet the suit having been wrongly decided against him on the merits, he was in appeal entitled to the decree sought (L. R. 9 Ind. Ap. 41.)

Illustration (*g*).

Illustration (*g*) is the kind of case in which, in English equity, there might be a bill to quiet possession, which would be followed by a perpetual injunction against further litigation, since at law an action of ejectment might, from its form, be brought over and over again by the same person. A declaration of right is really, in such a case, all that is needed in our courts. A declaratory decree is all that a plaintiff requires when he has no need of the assistance of the court to replace him in possession. (*Ramanuja* v. *Devanayaka*, I. L. R. 8 Mad. at p. 364.) We may notice that if A were wrongfully kept out of possession, he could not sue only for a declaratory decree, since, if entitled at all, he would be entitled at the same time to the further relief of possession under an executory decree. Further, B is supposed to be actively demanding possession from A, and it is thus essential for him to quiet his own possession by a declaration of his right, as otherwise a cloud would be thrown upon his title, and the value of his interest would be damaged by his facility for dealing therewith, as having a good marketable title to the property, being impaired. There is no sound reason for compelling a man, when others advance a claim to property which he believes to be his own, to wait till his evidence may be lost, to keep his arrangements for his family uncertain, and to suffer from a possibly serious diminution in the value of that property. Such a case was *Lowndes* v. *Bettle* (10 Jur. N. S. 226), also *Shivram Chintaman* v. *Tiru* (I. L. R. 13 Bom. 34), noticed *ante*, p. 279. Another instance was the case of *Secretary of State* v. *Jethabai Kalidas* (I. L. R. 17 Bom. 293), where a magistrate ordered the removal of an obstruction in front of plaintiff's shop as being on the public way. Plaintiff sued, and though it was argued that the suit would not lie against Government, the court held the contrary. The public roads being vested in the Government by a

local Act, the Government was "interested to deny" his title, and it was unnecessary for the plaintiff to wait until the Government had taken possession of the land. But A could not sue for a declaratory decree merely on the speculative ground that B might possibly at some future time—as because they happen from other causes to be bitter foes—attempt to question his title. He must show that B is either actually denying his title, or has some present tangible ground of interest in denying it, and that it is necessary for him to clear his own title from such doubt; as, for instance, if A is in possession as devisee under a will, and it is doubtful whether A takes solely or absolutely under the will, or whether B has any and what interest therein, either concurrently or in remainder. In the case of *Bhupal Ram* v. *Lachma Kuar* (I. L. R. 11 All. 253) H, a Hindu widow, transferred her deceased husband's estate by gift to her daughter. It was held that her action simply accelerated her daughter's succession and placed her by anticipation in possession of the widow's estate. There was therefore held to be no denying or any interest to deny the reversioner's right on the part of the widow, and he could not maintain a suit to have it declared that the gift was invalid.

In Illustration (*h*) it is obvious that it may be very essential that the *status* of D and her children should be established at once, before the evidence, now perhaps most readily available, may be lost or impaired by lapse of time. A similar power to make declarations of *status* as to marriage and legitimacy has been provided by enactments in England.

Discretion.

A judge interfering with the discretion exercised by a lower court in granting a declaratory decree should state his reasons for so doing. (*Kali Kishen Tagore* v. *Golam Ali*, I. L. R. 13 Cal. 3.) In a suit for a declaration of title when the court might have been entitled to reject the plaint on the ground that it disclosed no facts from which it could be said that the defendants denied the plaintiff's title, though, as a matter of fact, it does not do so, but finds from the evidence that there was such a denial, the court of appeal could not reverse the decree in plaintiff's favour solely on the ground that the plaint disclosed no cause of action without being satisfied that no such cause of action was established on the evidence. (*Shah Ahmed Sujad* v. *Taru Rai*, I. L. R. 7 Cal. 343.) It is for the court, in the exercise of its discretion, to decide whether plaintiff is competent to sue. (*Gyanendro Nath Roy* v. *Lobongomunjori*

Debi, 11 C. L. R. 198.) An improper or irregular exercise of the discretionary power conferred by this section does not in itself constitute sufficient ground for the reversal of a decree which is not open to objection on the ground of jurisdiction, or of the merits of the case, being covered by s. 578 of the Civil Procedure Code. (*Sant Kumar* v. *Deo Saran*, I. L. R. 8 All. 365; *Muhammad Mashuk* v. *Khuda Buksh*, I. L. R. 9 All. 622.) In granting a declaratory decree, when no consequential relief is claimed, the court should exercise its discretion with great caution. A declaratory decree can be made notwithstanding that plaintiffs do not sue for possession of lands. (*Loke Nath Surma* v. *Keshab Ram Dass*, I. L. R. 13 Cal. 147.) As explained by later cases, all that the proviso to the section forbids "is a suit for a pure declaration, without further relief; it does not compel a plaintiff to sue for all the relief which could possibly be granted, or debar him from obtaining a relief which he wants, unless at the same time he asks for a relief which he does not want." The Legislature intended by the section that the court might grant to a plaintiff the relief granted by the Court of Chancery in cases where no relief at common law was available. Where a proprietor's title was in danger, and he could not bring an action at common law to try the question of title, the court of chancery would give him the indirect form of relief, the more direct kind not being open to him. A mere declaration was never granted except on this condition. (*Bholai* v. *Kali*, I. L. R. 8 All. at p. 73.) A plaintiff admitting a defendant's right to a *kursa-jama* tenure in certain lands, but denying a permanent *malguzari* tenure set up by him, sought to eject the defendant from the *kursa-jama* holding and for a declaration that the defendant was not entitled to the permanent *malguzari* tenure. *Held* that the plaintiff was entitled to the declaration asked for notwithstanding that in consequence of his failure to prove a reasonable notice to quit he was unable to obtain a decree for ejectment. (*Kali Kishen Tagore* v. *Golam Ali*, I. L. R. 13 Cal. 3.) The restrictions imposed under this section must be held to refer to the consequential relief properly obtainable by the plaintiff as against the defendant in the suit, and are not to be extended to the case of all third parties who may possibly support some of the contentions of the defendant. When a title is in dispute there may be third parties who are honestly in doubt and ready to acknowledge the title of either of the contesting claimants, or who having attorned to one may be ready

Consequential relief.

to acknowledge the person declared by the court to have the title; and the object of a suit under this section might be practically defeated if it were necessary for the plaintiff to bring in all persons who may support the claim of the defendant. (*Subramanyan* v. *Paramasvaran*, I. L. R. 11 Mad. 116.) In a suit for a declaration that a conveyance executed by the defendant in favour of a third party was not binding on the plaintiff and for a specific performance of an antecedent oral agreement made by the defendant with the plaintiff, it was held to be no bar to the suit that the plaint contained no prayer for the delivery up and cancellation of the conveyance, inasmuch as its cancellation and delivery up in favour of the plaintiff was a species of auxiliary equitable relief which the plaintiff was not bound to claim under this section. The proviso of the section, it was said, is only applicable to such relief as is appropriate and consequent on the right asserted. (*Kannan* v. *Krishnan*, I. L. R. 13 Mad. 324.) The proviso refers to the position of the plaintiff when he commenced his suit. So where after decree in a suit for a declaration that certain alienations by a Hindu widow were void, the widow died, the fact that the plaintiff had not asked for possession in his plaint was held to be no bar to his proceeding with the appeal. The right of suit having once commenced the proviso could not be treated as taking away that right which had already accrued. The appellate court in this case refused to allow the plaint to be amended, as the amendment would alter the original cause of action and rest on an event which did not occur until after the suit had been instituted and dealt with by the court of first instance. (*Govinda* v. *Perumdevi*, I. L. R. 12 Mad. 136.) When plaintiffs asked for the cancellation of a deed and next for the restoration of the property, and the suit being dismissed and an appeal being preferred they were allowed in appeal to withdraw the second claim, the High Court in second appeal held that the second claim being maintainable the plaintiffs could not proceed with their suit in its maimed form, for to do so would be a mere evasion of s. 42. (*Bikutti* v. *Kalendan*, I. L. R. 14 Mad. 267.) Where a person sued for a declaration of his title to the *stanom* of fifth Raja of Palgat, and the *malikhana* allowance payable to him as such fifth Raja by the Government was in the hands of the defendant, the first Raja, who denied plaintiff's title and who withheld the money, the failure to sue for this allowance was held to be a bar to his suit under the section. (*Kombi* v. *Aundi*, I. L. R. 13 Mad. 75.) In the case of *Chomu* v. *Umma* (I. L. R. 14 Mad. 46), the plaintiff, as heir to her

husband, brought a suit in which Government was not represented, for a declaration of the title to a quarter share of the *jenmi* value of land taken up under the Land Acquisition Act, the value of which land was in the collector's hands. Objection was taken for the first time in second appeal that the suit was not maintainable, and following the authority of *Limba bin Krishna* v. *Rama bin Pimplu* (I. L. R. 13 Bom. 548) the Court held that the objection came too late, though the Judges were of opinion that the suit was maintainable in its present form. This would seem to be clear inasmuch as Government was no party to the suit. In a recent case a person obtained a decree in a suit in which he averred he was entitled to a particular office and to certain properties attached thereby and prayed (1) for a declaration that the defendant had no right to the office or the properties; (2) for an injunction restraining him from doing anything inconsistent with the plaintiff's right; and (3) for further relief. It appeared from the evidence for the defence that the defendant was in possession of part of the property, but no issue had been raised in the court of first instance as to the maintainability of the suit. The court of appeal held that the suit was not maintainable under the circumstances, but allowed the plaintiff to amend his plaint on payment of additional stamp duty. (*Abdulkadar* v. *Mahomed*, I. L. R. 15 Mad. 15.)

In a suit to have it declared that a *kanom* granted by the first defendant to second and third defendants was not binding on the plaintiffs' *tarward*, and where the property remained in possession of the *karnavan* on behalf of the *tarward* it was held that all that it was necessary for a junior member to do in order to prevent the possession becoming adverse to the *tarward* was to obtain a declaration that the *kanom* was invalid. (*Padammah* v. *Themana Ammah*, I. L. R. 17 Mad. 232.) When an objection was taken in the court of first instance that the plaintiff's suit was not maintainable on account of the absence of a prayer for possession as consequential relief, and the plaintiffs instead of asking for permission to amend their plaint, contended that the suit was maintainable and took a fresh issue upon it, the court of appeal refused an application to amend the plaint and drew a distinction between the cases of *Limba bin Krishna* v. *Rama bin Pimplu*, *Chanu* v. *Umar*, and *Abdulkadar* v. *Mahomed*. (*Narayana* v. *Shankunni*, I. L. R. 15 Mad. 255.) In a suit where the plaintiffs sought declarations that they were members of an undivided Alayasantana family with the defendants, that certain property belonged to the family,

and that plaintiff No. 1, the senior member of the family, was entitled to have the lands registered in his name, the defendants denied the allegations and pleaded that the suit for the declaration alone was not maintainable. It was held, that if, as alleged by the plaintiffs, plaintiff No. 1 was the *de jure* ejaman of the family, he was entitled to the possession and management of the family property, and that a suit for a mere declaration of his right would not lie. (*Muttake* v. *Thimmapa*, I. L. R. 15 Mad. 186.) Where the widows of a *shrotriemdar*, who was a *sudra*, brought a suit for a declaration of their title to his lands against his illegitimate son, who had been registered as *shrotriemdar* in lieu of his deceased father, and to whom certain ryots had attorned, the court, in appeal, came to the conclusion that possession of the whole of the property in dispute was with neither party. Most of the land was in the actual occupation of ryots, some of whom attorned to the plaintiff and some to the defendant. "Such a case," say their lordships "is eminently one in which a declaratory decree is desirable, to avoid multiplicity of suits and to obtain a decision once and for all, which shall secure peaceful possession of the property, and the court thought the proviso in s. 42 was no bar to the plaintiff's succeeding in the suit. (*Chinnammal* v. *Varadarajulu*, I. L. R. 15 Mad. 307.) In the case of *Sadarsingji* v. *Ganpatsingji* (I. L. R. 14 Bom. 395) the plaintiff sued for a declaration that he was entitled to succeed, on his father's death, to a *talukdari* estate, to the exclusion of defendant No. 1, an alleged supposititious child, set up by his step-mother to defeat the plaintiff's right of inheritance. Defendant No. 1 had obtained a decree against the plaintiff's father establishing his legitimacy and declaring him entitled to receive maintenance out of the estate. In accordance with this decree the *talukdari* settlement officer (defendant No. 2) who was managing the estate paid defendant No. 1 an allowance of Rs. 200 a month as maintenance. The plaintiff alleged that the payment of the allowance was illegal and wrongful, but did not ask for an injunction restraining him from receiving it. The Court held that the suit was barred under s. 42, as the plaintiff had omitted to ask for an injunction against the defendants, but he was allowed to amend his plaint by praying for an injunction against them. When three disciples of a *mutt* brought a suit alleging that the defendant was in possession of the *mutt* under a false claim of title as successor to the late *jheer* and praying for a declaration that

he was not the duly appointed successor to the late *jheer*, and that an appointment to the vacant office of *jheer* should be made by the Court, it was held that the suit was not maintainable, inasmuch as it was not asked that some duly qualified person should be appointed as the head of the *mutt*, and approved by the Court, and that the *mutt* and its properties be handed over to the person so appointed, the defendant being ejected therefrom. (*Strinivasa Ayyangar* v. *Strinivasa Swami*, I. L. R., 16 Mad. 31.) When plaintiff sued to enforce acceptance of a *patta* and execution of a *muchalka* by defendant, the court of first instance dismissed the suit as not being maintainable. The court of appeal, however, held that it should not have been dismissed but that the plaint should have been amended with the addition of a prayer for a declaration of the plaintiff's title, and that the court would have had jurisdiction to grant by way of consequential relief, the relief originally sought. (*Narasimma* v. *Suryanarayana*, I. L. R. 12 Mad. 481.) In a suit for a declaratory decree in respect of plaintiff's right to certain land, when it appeared that rent was due to the plaintiff in respect of such land, if his case were a true one and when such rent was not claimed Held that the further relief referred to in the proviso to s. 42 of the Specific Relief Act is further relief in relation to the legal character or right as to any property which any person is entitled to, and whose title to such character or right any person denies or is interested in denying, and does not include a claim for arrears of rent. (*Fakir Chand Audhikari* v. *Anunda Chunder Bhuttacharji*, I. L. R. 14 Cal. 586.) When defendant had been put in constructive possession of land which was actually in possession of tenants the want of a prayer for possession in the plaint, rendered the suit not maintainable. (*Krishnabhupati Devi* v. *Ramamurti Puntalu*, I. L. R. 18 Mad. 405.) When a plaintiff erroneously believing himself to be in possession of immoveable property brings a suit merely for a declaratory decree confirming his supposed possession, and the court finding him not to be in possession dismisses his suit on that ground, without any enquiry into his rights, he is not precluded from subsequently suing upon his entire cause of action for possession. (*Komola Kamini Dabia* v. *Lokenath Kur*, 11 C. L. R. 183.) The effect of an order under s. 59 of the Land Registration Act (VII of 1876 B. C.) being to "settle the actual possession," *viz.*, to determine that the plaintiff in the present case was not in possession (see p. 140), the person against whom such an order is made is precluded by s. 42

of the Specific Relief Act from bringing a suit merely for a declaration of his title without seeking to recover possession also. (*Ram Munduv* v. *Janki Pershad*, 12 C. L R. 139.)

Explanation to s. 42.

Lastly, a trustee such as is contemplated in the explanation to this section, would seem to be equivalent to one who, in English law, is termed "a trustee to preserve contingent remainders," and who may be essential under any system of law. Thus, in the simple case of limitation, to A for life, remainder to B as trustee during A's life to preserve contingent remainders, remainder to A's first and other sons in tail, remainder to C in fee, here, if before any son is born to A, he commits waste, or makes an invalid alienation, then B is entitled to sue to restrain such waste, or for a declaration as to the invalidity of the alienation. (*Garth* v. *Cotton*, 1 L.C. in Eq. 751.) Or B might be sued as defendant, as seems to be the case contemplated in the explanation; as where in like circumstances, A and B jointly do any act adverse to the title of the ultimate remainderman C, or where B alone does such after some forfeiture by A of his life estate.

Effect of declaration.

43. A declaration made under this chapter, is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.

Illustration.

A, a Hindu, in a suit to which B, his alleged wife, and her mother, are defendants, seeks a declaration that his marriage was duly solemnized and an order for the restitution of his conjugal rights. The court makes the declaration and order. C, claiming that B is his wife, then sues A for the recovery of B. The declaration made in the former suit is not binding upon C.

On the subject of this Illustration, Mr. Mayne (Hindu Law and Usage, 5th Edn., § 91) observes, "where the marriage is once completed, if either party refuses to live with the other, the case is no longer one for specific performance of a contract, but for restitution of conjugal rights. It has long since been settled that such a suit would lie between Hindus, but there was much conflict of authority as to the

mode in which the decree was to be enforced. The point was settled by s. 260 of Act XIV of 1882."

General principles briefly stated.

This section seems merely to enunciate a leading principle in the rather complex doctrine of *res judicata*, which is, of course, of universal application, and in no way peculiar to declaratory decrees. So that the rule here given would have been applicable though not expressed, and seems to have been added here by way of precaution. It would be a digression to enter here upon the discussion of such a wide and general topic of jurisprudence as the doctrine of *res judicata*. I will only point out that the Illustration to the section has been well chosen to draw attention to the distinction between judgment *inter partes* and *in rem*. The latter kind of judgment being a judicial declaration concerning the *status* of either a particular person or thing, which operates accordingly to confer the *status* adjudicated upon, rendering the fact what the court adjudicates it to be, is of universal effect, including thereafter all persons; but the distinction is very wide between a judgment of this kind, and a judgment in a case in which the question whether a particular *status* as to a person or thing existed or not, has merely been one of the issues of fact involved in the decision of the then subject-matter of litigation. This is a judgment purely *inter partes*, which can be conclusive only in subsequent litigation regarding the same subject-matter, upon the same ground of action, and between the same parties or their privies. The case put in the Illustration is clearly a case of this kind, and, therefore, the prior decision between A and B involving the issue of fact whether B had been married to A or not, could not be conclusive against C in a subsequent suit by him against A.

A decision in execution-proceedings that the decree awarded future mesne profits will be binding as *res judicata* in all future execution-proceedings. (*Ram Kirpal S.* v. *Mussamut Rup Kuari*, 11 Ind. Ap. 37.) It is so also in a decision as to what interest was payable under the terms of the decree. (*Bani Ram* v. *Nanhu Lal*, L. R. 11 Ind. Ap. 181.)

CHAPTER VII.

OF THE APPOINTMENT OF RECEIVERS.

Appointment of receiver discretionary.

44. The appointment of a receiver pending a suit is a matter resting in the discretion of the court.

The mode and effect of his appointment, and his rights, powers, duties and liabilities, are regulated by the Code of Civil Procedure.

Reference to Code of Civil Procedure.

The power of appointing a receiver of property, the subject-matter of litigation, is one long possessed, and constantly exercised by English courts of equity. It forms part of that precautionary justice or protective relief which courts of equity are wont to administer through a variety of methods, and which a great authority has thus described. The party seeks the aid of a court of equity because he fears some future probable injury to his rights or interests; and not merely because an injury has already occurred which requires any compensation or other relief. The manner in which this aid is given by courts of equity is, of course, dependent upon circumstances. They interfere sometimes by the appointment of a receiver to receive rents or other income; sometimes by an order to pay a pecuniary sum into court; sometimes by directing security to be given or money to be paid over; and sometimes by the mere issuing of an injunction or other remedial process; thus adapting their relief to the precise nature of the particular case, and the remedial justice required by it. (2 Story's Eq. 826.) Our courts practically possess all these powers of protective and preventive relief, in proof of which I may draw attention to the general words in s. 492, Civil Procedure Code, to the powers given by ss. 498, 499, Civil Procedure Code, and the appointment of a receiver under ss. 503—505, Civil Procedure Code. This last form of protective relief is the only one with which we are now concerned.

The nature of the relief.

It will be convenient to divide the consideration of this subject into four heads—

Division of the subject.

I. In what cases a receiver should be appointed.
II. His powers and rights when appointed.
III. His duties and liabilities.
IV. The practice on and after his appointment.

I.—In what cases a receiver should be appointed.—The first paragraph of s. 44 provides that the appointment of a receiver must be pending a suit, and that it is a matter resting in the discretion of the court. The first paragraph of s. 503, Civil Procedure Code, more at large, says that it may be "whenever it appears to the court to be necessary for the realization, preservation, or better

General rule.

Cases in which appointed.

custody, or management of any property, moveable or immoveable, the subject of a suit, or under attachment."

Discretion to be used.

The granting a receiver is always a matter resting in the sound discretion of the court, upon a view of the whole circumstances of a case, one of which is the probability of the plaintiff eventually succeeding; and hence a receiver has been refused where important points arose on the construction of deeds, which was attended with much difficulty and doubt. (*Owen* v. *Homan*, 3 M. & G. 378.) As was said in another case, it is a discretionary power, exercised by the court with as great utility to the subject as any authority which belongs to it; and it is provisional only, for the more speedy getting in of a party's estate, and securing it for the benefit of such person who shall appear to be entitled; and it does not at all affect the right. (*Ship* v. *Harwood*, 3 Atk. 564.)

Definition of a receiver.

A receiver may be defined as an indifferent person between the parties, appointed by the court to receive the rents, issues, and profits of lands, or other thing in question, pending the suit, where it does not seem reasonable to the court that either party should do it, or when a party is incompetent to do so, as in the case of an infant. (2 Dan. Ch. Pr. 1552.) He is appointed on behalf of all parties and not of the plaintiff or one defendant only; and the rights of the parties are not affected by the appointment; for he is an officer of the court, holding the property for the party who may ultimately appear to be entitled to it. (*Davies* v. *Marlborough*, 2 Swan. 118; *Portman* v. *Mills*, 8 L. J. (N. S.) 161 Ch.) Money in a receiver's hands is *in custodia legis* for whoever can make out a title to it; and hence it has been held that when a puisne incumbrancer obtains the appointment of a receiver, any prior incumbrancer on the same property may sue and attach the rents in his hands. (*Delany* v. *Mansfield*, 1 Hog. 234.)

General object in view.

Such appointments resting in discretion, the general principles rather than the precise limits of its exercise are all that can be stated. The jurisdiction is equally applicable to cases where there is a present right of enjoyment, and to cases where the right of enjoyment is future or expectant. The object in all such cases is to secure the preservation of the property to its appropriate uses and ends; and wherever there is danger of its being converted to other purposes, or diminished or lost by gross negligence, the interference of the court becomes

indispensable; as where property in the hands of a trustee for certain specific uses or trusts (express or implied) is in danger of being diverted or squandered to the injury of any claimant having a present or future fixed title thereto, the administration will be duly secured in the manner deemed best fitted to the end, as by the appointment of a receiver or otherwise. (2 Story's Eq. 827.) Not unfrequently such a receiver is appointed at the same time that an injunction is issued against one or more of the parties to the suit, restraining him from doing some particular act.

Pendency of suit.

Though s. 44 assumes that the appointment of a receiver is pending a suit, it does not follow that the decree puts an end to the appointment; but in such a case as where there is a decree to dissolve and wind up a partnership, and a receiver has been appointed pending the litigation, at an early stage in the cause, there would appear to be no objection to his being continued till the litigation is in fact terminated by the adjustment of the claims of all parties in conformity with the decree. Where a defendant has died, no receiver will be appointed until the representative of the estate is made a party. (*Atkins* v. *Shephard*, 43 Ch. D. 131.)

The Civil Procedure Code, s. 503, provides that a receiver may be appointed of any property moveable or immoveable, *the subject of a suit, or under attachment*. The form number 168 in the fourth schedule of the Code shows that the words "or under attachment" will apply to property for the first time attached in execution of any decree. It will also, I apprehend, apply to property not being the subject of the suit, but attached before judgment under the general provisions on that subject. (On the like English practice see *Salt* v. *Cooper*, 16 Ch. D. 544.)

Limit of s. 44.

But the object of s. 44 of this Act is limited (in accordance with the general scope of the Act) to the appointment of a receiver by way of specific relief pending a suit. It does not, therefore, I conceive, apply at all to property under attachment either by way of security for, or in satisfaction of a decree; then the appointment of a receiver is rather a matter of ministerial procedure than of specific relief. Further, a receiver appointed under ch. XX, of the Code in the case of an insolvent judgment-debtor, is, of course, to be carefully distinguished from a receiver appointed by way of specific relief pending a suit. In such case, a receiver is the agent of the creditors, and not also of one who

(as, for instance, a mortgagee) claims adversely to them, and who may, therefore, take hostile proceedings against the receiver. (*Exp. Warren*, L. R. 10 Ch. 222.)

The property may be of any kind.

Any description of property may be committed to the custody of a receiver; and this will include the stock-in-trade or outstanding assets of a trading partnership, shares in companies, or securities in the public funds, equally with the rents and profits of real estate. Property may be the subject of a suit though there is no question as to its ownership; thus, where there are persons having several and successive mortgages, liens, or charges upon such property, and contending among themselves, or against the owner, as to enforcing their respective claims against the property. So where extensive *tarwad* estates in Malabar are under the management of a *karnavon*, or generally, where under Hindu law one member of the family is to be regarded as agent or manager for the others, and he is misapplying and wasting the property, a proper case might be made out for a receiver, till another member could be selected as manager; so again in a suit as to such incorporeal property as the right to receive dues and duties, or such like incorporeal rights, whether purely personal as annuities, or in a sense accessory to real estate as rent-charges, where the question is as to which of several claimants is entitled to receive them, it might be a very proper course to appoint a receiver to secure the collection of the dues pending the litigation. As an instance of when a person, having a future interest only, may have a receiver as against the party entitled to the present enjoyment of the property, may be put the case of where the tenant of a particular estate, as for life, neglects to keep down the interest due upon incumbrances; as where such were created by a predecessor, who had power to render the estates liable to be sold outright in default of the due discharge of the interest, and there is a mere tenant for life in possession, as a Hindu widow, and there are heirs of her husband expectant upon her death, and the rents, if duly managed, are ample for all purposes. (2 Story's Eq. 838.)

Cases of dispute as to title to realty.

In cases involving the title to real property, the courts seem generally unwilling to disturb the possession of one party by appointing a receiver, unless a strong case of fraud or of danger of loss is made out. Where a devisee under a will claimed an estate against the heir, it

was held that a receiver will not be given against the heir, pending a trial of the title, except in a strong case, as where the court feels clear from the evidence that there is no ground to impeach the will, or where the heir, by his conduct, throws a doubt upon his own title. (*Fingal* v. *Blake*, 1 Moll. 158; *Jones* v. *Gregory*, 9 Jur. N. S. 1171.)

The Shrewsbury case.

In the great *Shrewsbury case*, where there were trustees of inalienable estates under an Act, and the last Earl attempted to alienate them, and devised them to the same trustees, in trust for particular persons, and these trustees accepted the latter trust; but their duties under it were inconsistent with those under the Act; and some of the tenants had paid rent to the trustees, but others had refused to do so, a receiver was appointed of those estates, if any, vested in the trustees, the tenants of which had not paid rent to the trustees; and the trustees were put upon an undertaking as to the other estates. But it was laid down, as a well-settled rule, that, in the absence of fraud and where there is no privity between the parties, the court will not interfere to appoint a receiver at the instance of a person alleging a mere legal title in himself, against other persons who are in possession of the estate; but it will interfere to prevent acts of malicious and destructive waste. In such a case, the refusal of the tenants to pay rent to either of the conflicting claimants, and the consequent danger of loss, are not a sufficient ground, unless there be an allegation that proceedings have been taken against such tenants, as the court would not assume that the tenants would not pay the rents if proceedings were taken against them. They would either do so, or for their own sake would either cause the real litigants to interplead, or pay the rents into court, and so they would be secured. But though "that the tenant is to be indemnified and saved harmless, is manifest equity, that does not substantiate the equity of one person, who is out of possession, in putting the other, who has been more fortunate in obtaining possession (for he is there, and has obtained the legal right which possession gives), out of possession by the appointment of a receiver." (*Talbot* v. *Hope-Scott*, 4 K. & J. 96, 138; *Carrow* v. *Farrior*, L. R. 3 Ch. 728.)

Where a plaintiff had conveyed his estates to defendant in trust for payment of his debts by sale, upon a strong case of waste supported by affidavits on the part of plaintiff, a receiver was appointed even before the defendant's answer had been put in. (*Vann* v. *Barnett*,

2 Bro. C. C. 158.) But the court will not, before the hearing of the cause, appoint a receiver of the rents and profits of real estate, on the mere ground that the party making the application has a good title, no fraud or spoliation being alleged against the party in possession. (*Toldervy* v. *Colt*, 1 J. & C. 621.) So a receiver will not be appointed when the rights as between the plaintiff and defendant are doubtful, if the defendant has obtained the legal estate without fraud, and no case of danger as to his security is alleged. (*Lancashire* v. *Lancashire*, 9 Beav. 120.) Nor will a receiver be appointed over a defendant's property to enforce his appearance in the suit, if he resides out of the jurisdiction, unless the plaintiff has a specific lien upon the land, or there is danger of the immediate loss of the property. (*Arthur* v. *Arthur*, 1 Hog. 95.) So, it used to be a general rule of English equity not to appoint a receiver where the party has the power to help himself, as by re-entry, by distress, and so on. (*Sollory* v. *Leaver*, L. R. 9 Eq. 22); and though recent legislation has given the courts much larger powers *Anglo-I. Bank* v. *Davies*, 9 Ch. D. 293), and the terms of our Code are equally wide, yet facts that formerly sufficed to bar the appointment may well be still used as grounds of objection to it, unless further cause be shown for it.

Cases of receiver refused.

So in a dispute between a devisee and an heir, it must be shown that the property will be endangered by being left in the possession of the heir. (*Clark* v. *Dew*, 1 R. & M. 103.) It may, perhaps, suffice to show that neither party can rightly be said to be in possession, but that it is really vacant. (*Parker* v. *Siddons*, L. R. 16 Eq. 34.) But where from the answer itself, there is a strong presumption against the defendant's title, which is impeached by the bill, the court will, it has been said, grant a receiver. (*Stitwell* v. *Williams*, 6 Mad. 49); and where on an advance of money defendant had agreed to execute a mortgage, but failed to do so, and arrears of interest on the sum advanced were due, on a bill for the specific performance of the agreement to execute the mortgage, a receiver was granted pending the litigation. (*Shakel* v. *Marlborough*, 4 Mad. 463.) So where an agreement was entered into by A for the sale of an estate to B, to be completed and the purchase-money paid within five years, and interest half-yearly in the meanwhile, with power to the vendor to re-enter if the interest was in arrears for twenty-one days; and C advanced money to B on a

Cases of receiver granted.

mortgage of B's interest, and A agreed verbally with C to extend the term for the payment of half-yearly interest; and the interest being in arrears, so that A was entitled to re-enter under the agreement with B, but not under that with C, A had re-entered, a receiver was appointed on the application of C. (*Dawson* v. *Yates*, 1 Beav. 301.) And where estates were vested in trustees, and in consequence of disputes among them, the payments of rents had been permitted to fall into arrears, and a suit had been instituted by the party entitled to the rents for life against the trustees, the court appointed a receiver with costs to be paid by the defendants. (*Wilson* v. *Wilson*, 2 Keen, 249.) So where a testator bequeathed the residue of his real and personal estate to his widow, her heirs, executors and administrators, "having perfect confidence, she will act up to those views which I have communicated to her in the ultimate disposal of my property after her decease;" and afterwards the testator's widow died intestate, and the bill filed by the plaintiffs alleged that the testator had bequeathed the residue of his property to his wife, on the faith of a promise that she would dispose of it in favour of the plaintiffs, who were his natural children, the court, on motion supported by affidavits verifying the allegation, granted a receiver of the real estates against the heir, and the second husband of the testator's widow. (*Podmore* v. *Gunning*, 5 Sim. 485.)

Case of rent-charges

When there were a number of rent-charges on an estate with power to the grantees thereof of entry and distress, and no one could be induced to become a tenant, on account of his having no protection against the various grantees of such rent-charges, a receiver was appointed for the protection of the estate pending litigation on behalf of such grantees. (*White* v. *Small*, 22 Beav. 72.) In one case where the purchaser of a coal mine sued to rescind the contract on the ground of fraud, but it was essential to its existence that the mine should be kept in a going state, and the purchaser was in possession, on the application of the purchaser, a receiver and manager was appointed pending the suit, the costs thereof to abide the result. (*Gibbs* v. *David*, L. R. 20 Eq. 373.)

Cases between co-tenants.

In cases of disputes between persons entitled to the undivided possession of real estates, as joint-tenants, tenants in common and coparceners, English courts have sometimes shown an unwillingness to appoint a receiver. Thus it has been laid down, in one case, that a receiver will

not be granted in a suit for partition by one tenant in common against another; unless a case of exclusion is shown (*Milbank* v. *Rivett*, 2 Mer. 405); and the same doctrine was held in the Irish case of *Spratt* v. *Abearne* (1 Jones, 50); and in the note to *Street* v. *Anderton* (4 Bro. C.C. 414), the same is stated as law; but in that case, a tenant in common in possession was ordered to give security for the payment to his co-tenant of his proportion of the rents, or that otherwise there should be a receiver. It is also stated in the note, that in another case a receiver was granted where the parties were brothers, and were tenants in common under an agreement made between them to compromise adverse claims and the eldest insisted upon his legal rights as heir-at-law, and that he ought not to be bound by the agreement which, he said, was executed by him in a state of intoxication. So in *Hargrave* v. *Hargrave* (9 Beav. 549), where the parties were brothers, and the estates in dispute between them had been devised to their father for life, with remainder to his children as tenants in common in tail, and the defendant was in possession of the whole estate, and insisted that the plaintiff was illegitimate, and there had been one decision in favour of plaintiff's legitimacy, but the question was still not finally decided, a receiver was granted of the rents and profits of a moiety of the estate, and it was ordered that the tenants should pay a moiety of their rents to such receiver. But in *Tyson* v. *Fairclough* (2 S. & S. 144), a motion for a receiver by one tenant in common against his co-tenant, on the ground that the latter had given notice to the tenants to pay their rents to him only, and had advertised the estate for sale, was refused because the conduct complained of did not, it was held, amount to an actual exclusion; and a strong opinion against interference in such cases was expressed. Though this case was afterwards questioned, the general principle that there must be something amounting to exclusion seems sound. (See *Searle* v. *Smalls*, 25 L. T. 106; and see *Sandford* v. *Ballard*, 30 Beav. 149; S. C. on Ap. 10 Jur. N. S. 251.)

Cases of mortgagees.

There are numerous cases of a receiver being appointed pending litigation between several mortgagees or other incumbrancers of real estates. Putting aside much that depends upon peculiarities of the English law of mortgage, there are some principles of general application to be gathered from the cases. Thus, a receiver will not be appointed as against a first mortgagee rightly in possession, unless he has been paid off, or refuses

[illegible] what is due to him, or cannot satisfy [illegible] show that anything, or what, is still due to him. (*Berney* v. [illegible] 1 J. & W. 647; *Evrington* v. *Parker*, 16 Ves. 469; *Hills* v. [illegible], 15 Beav. 175.) The mortgagee in possession may apply to the [illegible] for a receiver. (*Tillet* v. *Nixon*, 25 Ch. D. 238.) Where a receiver [illegible] appointed against a mortgagor in possession the latter is liable to [illegible] occupation rent only from the date of demand by the receiver and [illegible] from the date of his appointment. (*Yorkshire Banking Co.* v. *Mullan*, 35 Ch. D. 125.) After judgment for foreclosure absolute, the action being at an end, no receiver will be appointed though the conveyance to the plaintiff remains to be settled. (*Wills* v. *Luff*, 38 Ch. D. 197.) But whilst anything remains due, the court cannot substitute another security for that which the mortgagee has contracted for. As against a first mortgagee in possession, the proper course is for the second to redeem him, and in order to deprive the mortgagee of the possession, on the ground of mismanagement or collusion, the charge must be of a clear and specific nature. (*Rowe* v. *Wood*, 2 J. & W. 557.) In the case of charges (falling short of a regular mortgage) upon an estate, the appointment of a receiver may be a very appropriate relief as against the grantor who remains in receipt of all the rents and profits. (*Holmes* v. *Bell*, 2 Beav. 298; *Tanfield* v. *Irvine*, 2 Russ. 149.) The lien, which an unpaid vendor has upon land, and which may be eventually enforced by a sale, may meanwhile, under some circumstances, justify a temporary injunction or even the appointment of a receiver. Railway companies and others who have taken land under compulsory powers, are, equally with other purchasers, liable to have such lien thus enforced against them (*Wing* v. *Tottenham, &c., Ry. Co.*, L. R. 3 Ch. 740); but a temporary injunction before judgment to restrain meanwhile the use of the railway, or a receiver for some particular portion of the line left unpaid for, will not be granted, as the first would be a monstrous and vexatious interference with the use of the railway and public convenience, and the second a practically unproductive form of relief. (*Latimer* v. *A. & B. Ry. Co.*, 9 Ch. D. 385.)

Cases of personal property.

A receiver has also been appointed for the preservation of personal property vested in, or under the control of, trustees. Thus, where there was some disagreement between three trustees, and the majority acted alone, and took securities in their own names, omitting

the name of the dissenting trustee, it was held that the plaintiff, who was interested in the trust property, was entitled to a receiver. (*Swale* v. *Swale*, 22 Beav. 584.) In *Howell* v. *Dawson* (13 Q. B. D. 67), the Sheriff took in execution the cabs, horses, &c., of a cabman. A claimed that they were her property. Pending an interpleader-suit a receiver was appointed instead of a sale. Otherwise the business as a going concern would have been ruined though A's right was eventually established. Where a portion of a trust fund is lost, that is *primâ facie* a breach of trust, and a sufficient ground for the appointment of a receiver pending a suit. Thus, on a suit filed by a plaintiff insured in a society (whose funds were liable to pay the insurance money), on behalf of himself and other persons so insured, charging a loss of the funds through the negligence of the directors, and on the answer and affidavits showing that the secretary had absconded with part of the funds, and that some of the directors were in needy circumstances, it was held that the plaintiff was entitled to the appointment of a receiver, and to an injunction against the directors parting with or collecting the assets (*Evans* v. *Coventry*, 5 D. M. & G. 911.) So in the case of assignments of pensions or salaries (where such may be legally assigned) a receiver has been sometimes appointed on sufficient cause shown. (*Noad* v. *Backhouse*, 2 Y. & C. (C. C.) 529; *Palmer* v. *Vaughan*, 3 Swan. 173; *Cooper* v. *Reilly*, 2 Sim. 560.) Where, in a suit for specific performance of an agreement to assign goods as a security, the goods were in imminent danger of being lost, the plaintiff was appointed receiver on an *interim* order for fourteen days, *ex parte* and without security, on an undertaking to deal with the goods under the directions of the court. *Taylor* v. *Eckersley* (2 Ch. D. 302.) So, generally, a beneficiary is entitled to have a receiver, if it can be shown that the trustee has been guilty of misconduct, waste, or improper disposition of the trust property, or that the fund is in danger from his being in insolvent circumstances, or that one trustee has misconducted himself, and the other either consents to the order, or is incapacitated from acting, or that the executor is a person of bad character, drunken habits, and great poverty. (*Everett* v. *Prythergch*, 12 Sim. 367; Lewin on Trusts, c. 29, s. 5.) Where the sole executor and trustee has become insolvent, and there is no one to take care of the trust estate in whom the court can place confidence, that is good ground to appoint a receiver. (*In re Johnson*, L. R. 1 Ch.

When there are trustees.

325.) But as to an executor or administrator, so also as to a trustee generally, it is a rule that a strong case must be made out before a court will displace him by a receiver, and that mere poverty is not a sufficient ground, but some misconduct must be made out. (*Anon.* 12 Ves. 4; 1 Mad. 46.) A receiver may be appointed at the suit of trustees of leaseholds, where the tenant for life is in receipt of the rents, but is not keeping the houses in repair, so that there is danger of forfeiture by the superior landlord, and there are infant beneficiaries interested in remainder, whose interests might thus be damaged. (*Fowler* v. *Odell*, 16 Ch. D. 723.)

Cases between partners.

Another numerous class of cases, in which relief is given by appointing a receiver, is that of disputes between partners. The same general rule prevails as to the interference of a court between partners by way of a receiver as by way of injunction, namely, that to entitle one partner to an order for an injunction and a receiver against his co-partner, he must either show a dissolution, or facts which, if proved at the hearing, would entitle him to a decree for a dissolution. (*Smith* v. *Jeyes*, 4 Beav. 503; *Chapman* v. *Beach*, 1 J. & W. 594.) But there is in these cases this distinction between an injunction and a receiver, that whilst the former excludes only the person against whom it is granted, and may be directed against one partner who has so misconducted himself that he ought to be restrained from further interfering, the latter excludes *all* the partners from taking part in the management of the concern. It therefore does not follow that because the court will grant an injunction, it will also appoint a receiver, or that because it refuses to appoint a receiver, it will also decline to interfere by injunction. (Lindley on Part. 1017.)

Exclusion a ground for acting.

Still the appointment of a receiver is not ordered merely on a dissolution of a partnership; it will be ordered also on breach of duty of a partner, or of the contract, as by continuing to trade with the joint effects on a separate account. (*Harding* v. *Glover*, 18 Ves. 281.) So, where some members of a partnership, either in the ordinary course of trade, or in closing the transactions after a dissolution, seek to exclude others from a just share in the management, the court will appoint a receiver. (*Wilson* v. *Greenwood*, 1 Swan. 481.) Indeed, the most prominent point on which the court acts is the circumstance of one partner having taken upon himself the power to exclude

another partner from as full a share in the management as he, who assumes that power, himself enjoys.

Cases of going concerns.

A court will not appoint a receiver of the effects of a subsisting partnership, unless on the grossest abuses of some of the partners, since the appointment must destroy the trade. (*Oliver* v. *Hamilton*, 2 Anstr. 453.) Hence, though a dissolution is not expressly sought by the suit, the object and result of the suit ought to be to wind up the concern, or at least the suit must be so framed as that a decree may be made, either that the concern shall be carried on, after the withdrawal of an *interim* receiver, according to the terms of an instrument which, by the agreement of the parties, is to regulate the mode of its being carried on, or that it shall be wholly put an end to. The court cannot undertake the management of a going concern, but it may appoint an *interim* receiver for a limited purpose that does not displace the management, and may so leave it eventually to continue. (*Const* v. *Harris*, T. & R. 517, 525; *Hall* v. *Hall*, 3 M. & G. 79, 91.) The appointment of a receiver and manager of a going concern operates as a dismissal of the servants of the concern. (*Reid* v. *Explosives Co.*, 19 Q. B. D. 264.) A receiver and manager may be appointed prior to a sale as a going concern though the assets provide for a division of assets on a dissolution. (*Taylor* v. *Neale*, 39 Ch. D. 532.)

In one case it was said: "A receiver operates as an injunction; and the principle on which this court acts with regard to the appointment of a receiver in these cases is this: it will not appoint one upon motion unless it sees that there is an actual present dissolution arising from the acts of the parties, or that at the hearing it would, upon the merits, dissolve the partnership. If the partnership is a continuing one and may continue, it will only direct an account." (*Baxter* v. *West*, 1 D. & S. 173.) It is not every squabble that will justify interference. As was said in one case: "If partners quarrel, and one of them behaves *unrighteously* against the interests of the other, a receiver will be appointed; but if partners quarrel, a receiver will not merely on that account be appointed." (*Texeire* v. *Da Costa*, 2 Dan. Ch. Pr. 1565 *y*.) Though exclusion is generally a sufficient ground, partners may by contract provide for the exclusion of one partner on the happening of certain events, as on his becoming insolvent; but questions arising between partners are not to be determined upon the

Nature of the quarrel regarded.

motion, as the only object is to protect the assets till the determination of the rights of the parties. (*Blakeney* v. *Dufaur*, 15 Beav. 40.)

In case of the death of one partner.

Partnership is based upon the mutual selection of, and confidence in each partner by the others; and hence the reluctance felt in interfering, by means of a receiver, with the other or surviving partners, does not apply as against strangers who, from unforeseen events, as death or insolvency of a partner, have acquired an interest in the assets; and much less does it apply where the confidence inducing to the partnership was the result of the fraud or deceit of the other partners. (Lindley on Part. 1018, 1020.) Hence, where both partners are dead, a receiver will be appointed; but not merely on the ground that the partnership is dissolved by the death of one of the partners. Ordinarily the surviving partner is entitled to the management for the purpose of winding up the concern, and to displace him there must be evidence of some breach or neglect of duty. (*Phillips* v. *Aitkinson*, 2 Bro. C. C. 272; *Collins* v. *Young*, 1 Macq. 385.) Still, where two partners, on the termination of the partnership, came to an arrangement, for mutual convenience, that a third person should collect the outstanding assets, and this agreement was acted upon for some time, and then one of the partners died, it was held that the surviving partner could not repudiate the agreement, and alone collect the debts, but that the executors of the deceased partner had a right to have a receiver appointed. (*Davis* v. *Amer*, 3 Drew. 64.) So, where surviving partners insisted on continuing the partnership with the assets of a deceased partner, the representatives of the latter were entitled to a receiver. (*Madgwick* v. *Wimble*, 6 Beav. 495.) And where two partners renewed a lease of the partnership premises, and the administratrix of the deceased partner showed a *primâ facie* title to participate in the benefit of it, a receiver was appointed to protect the property till the rights of the parties could be decided. (*Clegg* v. *Fishwick*, 1 M. & G. 294.) So a receiver of debts due to a business was appointed at the suit of persons to whom a share of the profits had been assigned against a subsequent assignee of the debts. (*Candler* v. *Candler*, Jac. 225.)

One partner may be the receiver.

Where a receiver is ordered to be appointed, the court will sometimes appoint as such the surviving partner, or the one who has hitherto actually carried on the business, as this puts him in the same relation to the court as an ordinary receiver. Thus in one case a

retired partner, who had advanced all the capital, and was liable for the partnership debts, was, out of regard for his interest, appointed receiver of the partnership assets on his own application. (*Hoffman* v. *Duncan*, 18 Jur. 69.)

Fact of partnership should be clear.

If, in defence, the partnership is denied, it would seem that there ought to be no receiver till the fact is *primâ facie* proved; and if the illegality of the partnership is alleged, and that appears, there can, of course, be none; but otherwise the very character of the defence set up will be a motive for interfering. (*Peacock* v. *Peacock*, 16 Ves. 49; *Hale* v. *Hale*, 4 Beav. 369.) But the relation of the parties may be such as to entitle one of them to a receiver, though it may not constitute a partnership. Thus, where by a memorandum in writing the defendant, a general merchant, agreed with the plaintiff, in consideration of the general services of the latter, to allow him, in addition to a fixed salary, one-fifth of the net profits on all new business entered into through him, it was held that whether or not a partnership was thereby constituted, the plaintiff had, at any rate, acquired a right as against the defendant to an account of profits, and the appointment of a receiver. (*Katsch* v. *Shenck*, 18 L. J. (N. S.) 386 Ch.)

Powers and rights of receiver.

II.—The powers and rights of a receiver when appointed.

On this subject the terms of s. 503, Civil Procedure Code, must be consulted. The first result of the appointment is that "if need be," the person in possession or custody of the property is removed therefrom, and the same is committed to the receiver. Secondly, the court, so far as it thinks fit, gives to the receiver "such powers as to bringing and defending suits, and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of instruments in writing as the [or an] owner himself has." In other words, the court may confer on the receiver any or all of the powers of an absolute owner of property. In one case the court protected a receiver and manager when a libel on the business was published and the receiver interfered with. (*Helmore* v. *Smith*, 35 Ch. D. 449.) Thirdly, the court fixes such remuneration for the receiver in the form of fees or commission as the court thinks fit.

General rule in the Code.

Possession need not be changed.

Firstly, on the appointment of a receiver, the person in possession will not necessarily be removed, but only "if need be." Much will depend upon the nature of the property in relation to which the receiver is appointed. In *Sharp* v. *Carter* (3 P. Wms. 379), it was said that the appointing of a receiver is not, in every case, a turning the party out of possession. For instance, it is not so where a receiver is appointed of an infant's estate, for there the possession of the receiver is the possession of the infant; but on appointing a receiver in an adversary's suit, the possession of the receiver seems to be the possession of him who is ultimately found to have the right to it. So these words of s. 503, Civil Procedure Code, may be taken as intended to refer not solely to the party in the suit, but also to his tenants who are in actual possession; and, of course, on appointing the receiver of an estate, the possession of the tenants is not usually interfered with. Again, a receiver may be appointed of the rights and dues of an office, or of the income of a charitable or other institution, without affecting the duties of the office-bearer, or the control and management of the institution. So where a municipal corporation was authorized to mortgage the tolls it received, it was held that a receiver of them might be appointed as a necessary incident to such authority; but that the receiver ought not to have committed to him any powers of management, which ought properly to be exercised only by the corporation itself. (*De Winton* v. *Brecon*, 26 Beav. 533; 6 Jur. N. S. 1046.) So in a suit between joint farmers of ferries in India, a receiver of tolls might be appointed without interfering with the possession or management of the ferries. Again, in a partnership dispute, a receiver might be appointed for a limited purpose, without vesting in him the actual management of the concern. (*Const* v. *Harris*, T. & R. 517.) So with respect to the partnership books and papers, an order for their delivery will not be made if there is no necessity for it, and if it would occasion inconvenience. This was held where the business was that of solicitors, and as the receiver had free access to all the books and papers, nothing more was considered necessary. (*Dacie* v. *John*, McClel. 206; Lindley on Part. 1023.)

The general proviso at the end of s. 503 as to the removal of persons in possession must be borne in mind, for though in terms limited to property placed under attachment, the principle is applicable generally, and may be illustrated by the case of tenants, having a right to

hold for a term, and whose possession cannot be disturbed. The words are: "Nothing in this section authorizes the court to remove from the possession or custody of property under attachment any person whom the parties to the suit, or some or one of them, have or has not a present right so to remove."

The powers conferred should be specified and limited.

Secondly, as to the powers that may be granted to receivers, the terms of s. 503, Civil Procedure Code, are practically unlimited; but it is not usual in England to give such powers, and our courts in India must here exercise a wise discretion. The object of the appointment is the preservation and good management of the property pending the litigation, and the powers that may be given, though very full, are yet to be "such of those powers as the court thinks fit;" that is, the powers to be granted to a receiver are within the discretion of the court, and they ought to be made to depend upon the nature of the property committed to his custody or management. It should be borne in mind that if the order of appointment grants to the receiver the full powers without qualification, as specified in s. 503, any third person dealing *bonâ fide* with the receiver is perfectly safe if he looks to the terms of the order, and a contract within their scope, once made between him and the receiver, cannot be defeated, either by the court or the ultimate owner of the estate. For example, a receiver may consider that it is desirable "for the improvement" of an estate—as indeed it very well may be,—to grant building or mining leases for 99 years or any other long term; or he may fancy that it will be proper "to apply and dispose" of all the rents and profits in some ornamental improvements, some *impensæ voluptuosæ*, as Lord Chancellor Campbell once called them; and then when the true owner at last comes into his rights, he may find his estate built over, or mined under, in a manner that utterly mars all his enjoyment of it; or he may be burdened with an elaborate house and grounds quite unfitted to his wants, wishes or means; as the old phrase goes, he may find himself "improved out of his estate." I think the practice in English equity has been rather over-cautious, leading to needlessly frequent applications to the court as to what should be done in the management of the property; but this is to be preferred, and especially in India, to the other extreme of an unlimited, and what may easily be a ruinous confidence in the discretion, judgment, and integrity of the receiver. I cannot conceive of any case in which a

court should grant, without qualification, the full power of s. 503, and, as a general rule, I would suggest, that the court ought carefully to consider in each case the nature of the property, and the period for which it is likely to be under the receiver, and that the powers granted should be somewhat fully specified in the order of appointment, and be limited to such as are needed in the more ordinary and almost daily management of the property, and that on all special and extraordinary matters special application should be made to the court from time to time. This may give the court a little more trouble at first starting, but will save much future litigation and possible loss, shut many doors to fraud, and is, after all, only what is justly due to the interests of all parties. I will now briefly indicate what has been the practice of English Courts in this respect.

Powers as to rents.

A receiver of real estate has the ordinary power of distraining for one year's rent, and a tenant who has been served with the order to pay his rent to the receiver, cannot pay it to any other person; and if the receiver dies, he must retain it for a new receiver when appointed. (*Brandon* v. *Brandon*, 5 Mad. 473; *Pitt* v. *Snowden*, 3 Atk. 750; *Russel* v. *Baker*, 1 Hog. 180.) Though the receiver is entitled to the arrears of rent at date of the order, yet where the produce of an estate had been severed, and consigned, prior to the appointment in discharge of previous advances made by the consignees, he was held not entitled to it. (*Codrington* v. *Johnstone*, 1 Beav. 520.) An attornment by a tenant of land to a receiver appointed to collect the rents, and payment of rent to such receiver, creates a tenancy by estoppel between the tenant and receiver, but does not serve to enable the person who is found ultimately to have the legal title to the land, to treat the tenant as his tenant, and to distrain for rent. (*Evans* v. *Mathias*, 26 L. J. 309 Q. B.) If a party to the suit is in possession of part of the premises, there ought to be a special order as to turning him out of possession, or for fixing an occupation rent if left in. (*Griffith* v. *Griffith*, 2 Ves. 401.)

Powers to lease.

A receiver has, in England, power to let to the best advantage but he cannot raise the rents upon slight grounds, nor turn out tenants, without application to the court. (*Wynne* v. *Newborough*, 1 Ves. Jr. 164.) It would be easy to specify in the order the length of term for which a lease might be made without special leave of the court, and to give power to terminate tenancies by ordinary notice to quit.

Powers as to improvements and repairs.

It seems also to be a general rule in England that a receiver shall not be permitted to lay out more than a very small sum at his own discretion for improvements or repairs. (*Waters* v. *Taylor*, 15 Ves. 26; *Blunt* v. *Clitherow*, 6 Ves. 799.) This seems needlessly strict, but it would be well to limit a sum to be expended on any one object without special leave. In the case of an infant's estate, where the position of a receiver is very different, it has been held that the repairs of the family mansion, the continuance of the family charities and accustomed bounty to the poor were reasonable and proper outlays, and to be allowed to a receiver, especially where there is no compulsory provision for the poor. (*In re Reddington*, 1 Moll. 256.)

Powers to sue.

As to bringing suits at least, the powers of the receiver may well be limited in the order. But the necessity of preserving the property committed to his custody will then justify an exception to the general rule against suing without leave; thus, if waste has been committed, and the case is pressing, the receiver should file a suit for an injunction without waiting for an order. (*Nangle* v. *Fingal*, 1 Hog. 142.) So where the object is to have an injunction to restrain one tenant of the estate from quarrying on a private road, part of the premises, and which is common to all the tenants. (*Dorman* v. *Dorman*, 3 Ir. Eq. R. 385.) So in partnership cases, or generally where the chief duty is to get in personal assets, a much wider discretion as to bringing suits may rightly be allowed; but otherwise the court is bound to be discreet, and not to leave the receiver unrestrained to indulge in widespread litigation at the expense of others.

Remuneration of receiver.

Thirdly, the receiver is entitled to such remuneration as may be fixed by the court; this may be in the shape of fees or commission, and under the former a salary might, I conceive, be included. The rate is to be settled on the facts of each case; 5 per cent. is a common rate on rents; but if the sums are numerous, small in amount, or frequently payable, it may be more; or if the collection is easily made, and in large amounts, a much lower rate, or a lump sum by way of fee or salary, may be fixed. A like discretion is to be exercised in cases where personal assets are to be got in. (*Day* v. *Croft*, 2 Beav. 488.)

Who bears the expense of a receiver.

As between tenant for life and remainderman, it seems to be the rule that the remuneration of the receiver must be borne by the tenant for life. There is a certain plausibility in the contention that the appointment is for the benefit of both parties, and that the expenses thereof ought to be apportioned; but to this it has been answered that if it becomes necessary to have a receiver, the estate for life is inherently subject to it, and it is the right of the remainderman to have the receiver, and to have the ordinary expenses paid out of the life estate. (*Shore* v. *Shore*, 4 Dr. 501.) So where a receiver is appointed in a suit for the specific performance of an agreement to purchase an estate, if the purchaser is ultimately compelled to take the title, the receiver is to be considered as his receiver. (*Boehm* v. *Wood*, T. & R. 345.)

Duties and liabilities.

III.—The duties and liabilities of a receiver.

Security to be given.

Firstly, as to the security (if any) to be given by him. Ordinarily the kind of security is the bond of the receiver and two sureties in a certain amount, as in the form No. 169 of the 4th schedule of the Code. But a deposit of money or of public bonds by way of security is also contemplated by the Code. If the court selects the receiver, the proper rule seems to be never to appoint him without security; but the parties may be allowed, of their own authority, to nominate some person as a receiver, and then to apply for liberty for him to act without security. (*Manners* v. *Furze*, 11 Beav. 309.) As to the amount of security, the English rule of double the annual income seems too burdensome; this should be avoided, and much may be done by regulating the periods for passing the accounts, so that the receiver may not be left with large sums in his hands. There may be cases in which the court may reasonably be satisfied with the security of the receiver alone, or the number of sureties may be increased, so as to reduce the amount for each. (*Carlisle* v. *Berkley*, Ambl. 599.)

Liability of his sureties.

The liability and rights of the sureties do not differ in principle from those of sureties generally, and a few cases only need be briefly stated. Thus, to enforce a surety's security-bond it is not enough to show merely that something is due from the receiver, but the precise amount of what is due must be stated. (*Ludgater* v. *Channel*, 15 Sim. 479.) But sureties are liable not only for the sums lost by the

misconduct or negligence of the receiver, but also for the costs necessarily caused thereby. Thus it has been held that a surety is, to the amount of the security-bond, answerable for the costs of an attachment against a receiver for not accounting, and for the costs of appointing a new receiver, and for the costs of the order on the tenants to pay their rents to such new receiver. (*Maunsell* v. *Egan*, 3 J. & Lat. 251.) But where a receiver had become bankrupt, but there had been great delay on the part of the parties interested in the suit, in applying to have his accounts passed, the sureties were, under the circumstances, held not to be liable for interest on the balance found due, though the receiver would have been liable. But otherwise sureties are liable for the same interest as well as principal, as the receiver would have been liable for. (*Dawson* v. *Raynes*, 2 Russ. 466.) On the other hand, a surety for a receiver is entitled to stand in the place of the receiver, and to be paid sums ordered to the receiver out of funds in court on account of disbursements made by him, the money having been advanced by the surety. (*Glossop* v. *Harrison*, Coop. 61.) So, where the receiver was himself entitled to shares in an estate, some by descent and others by purchase, and gave his sureties an indemnity on the former, excluding the latter, and then became bankrupt, and the sureties paid up the amount of their security-bond, which did not cover the balance due, it was held that after the other part owners were satisfied out of the receiver's shares and the sum paid by the sureties, the sureties were entitled to stand in the place of the part owners and to come upon the shares of both kinds for the sum they had paid up. (*Brandon* v. *Brandon*, 3 DeG. & J. 524.) It seems that as to moneys received and not accounted for, either through mistake or fraud, by a receiver, he is a trustee for the persons entitled thereto, and cannot, as against them, avail himself of limitation; and this, though his final accounts may have been passed, and his security vacated. (*Seagram* v. *Tuck*, 18 Ch. D. 296.)

Passing accounts.

Secondly, as to the receiver's duty to pass his accounts and pay the balances as due. It is the obvious duty of the receiver to bring in regular accounts and to pay the balance into court or otherwise, as he may have been directed in the order of his appointment. If, in the intervals fixed, he receives sums of such an amount as to make it worth while to lay them out, he ought to take the necessary steps that they may be made productive for the benefit of the estate. (*Shaw* v. *Rhodes*, 2 Russ. 539.)

Where a receiver does not pass his accounts regularly, he may have his commission disallowed; or if he improperly retains the balance, he may be charged with interest thereon on passing his next accounts, the rate charged being generally 5 per cent. (*White* v. *Lincoln*, 8 Ves. 371; *Harman* v. *Foster*, 1 Hog. 318.) Where a receiver had been bringing in his accounts very irregularly in point of time, so that the actual balance in his hands had never clearly appeared, he was ordered specially to bring in his accounts by a given day with an affidavit as to the balance, and an inquiry was directed as to former balances, and he was charged with the costs. (*Bertie* v. *Abingdon*, 8 Beav. 55.) Irregularity of this kind is also noticed in England by attaching the person of the receiver, by depriving him of his salary, and taking his accounts with rests, and charging interest. (*Davies* v. *Cracroft*, 14 Ves. 143; *Potts* v. *Leighton*, 15 Ves. 273; *Harrison* v. *Bozdell*, 6 Sim. 211; *Bristowe* v. *Needham*, 9 Jur. N. S. 1168.)

Receiver's liability for losses.

Thirdly, as to the general liability of the receiver for losses. The grounds specified are wilful default or gross negligence. A receiver being a trustee for all parties, or for the one ultimately found entitled, is subject to the same obligations and liability as an ordinary trustee, thus he is not allowed to make other than the authorized emolument out of his trust; he may not bid at the sale of the lands over which he had been appointed receiver; so a purchase in trust for him of such lands will not be permitted to stand, unless it has been had with the leave of the court. (*De Winton* v. *Mayor of Brecon*, 2 L. T. (N.S.) 787, Ch.; *Anderson* v. *Anderson*, 9 Ir. Eq. R. 23.) Nor can he become tenant of any part of the lands, unless with consent of the parties, and where it is for the benefit of the estate. (*Aloen* v. *Bond*, 3 Ir. Eq. R. 365; *Stannus* v. *French*, 13 Ir. Eq. R. 161.) So a receiver, though he passes his accounts and pays his balances regularly, is not entitled to make interest for his own benefit of moneys which come to his hands as receiver during the intervals between the times of passing his accounts. (*Shaw* v. *Rhodes*, 2 Russ. 539.) In the case of a minor's estate, surplus sums should be invested, or he will be charged interest, and the buildings being out of repair, and so on, is no excuse for his keeping excessive amounts in his hands. (*Hicks* v. *Hicks*, 3 Atk. 274.) So it has been held that the primary duty of a receiver over leaseholds is out of the sub-rents to discharge the head rent, and so protect the property, and that it

will be no excuse that he spent the money on other authorized demands. (*Balfe* v. *Blake*, Ir. C. R. 365.)

Loss from negligence.

He is liable for loss arising from want of ordinary diligence, for the omission of ordinary diligence is gross negligence. Thus he must make good to the estate any rent he has lost by his negligence. (*In re Skirrels*, 2 Hog. 192.)

He will be charged with the loss from the failure of a banker, where he has made remittances to his own credit and use, and not to a separate account for the trust; and where he was in the habit of paying the moneys he received into a banker's hands, and receiving interest on the balances, he was held liable for the loss occasioned by the banker's insolvency, although then the time for passing his accounts had not arrived. (*Wren* v. *Kirton*, 11 Ves. 377; *Drever* v. *Mawdersley*, 13 L. J. (N. S.) 433, Ch.) But he will not have to make good a loss not owing to his own default. He is entitled, for instance, to use the ordinary means for making remittances; and indeed, where the rents are large, it is a necessary precaution to remit them by bills rather than in coin. Where a receiver pays money to a banker, and takes bills for the same, if he was in credit at the time, though he fails soon afterwards, it shall not affect the receiver. But if the money had been lost by his wilful default in placing it in hands notoriously improper, he shall make good the loss. (*Knight* v. *Plymouth*, 3 Atk. 480.) But he is liable if he parts with his own proper and unfettered control over the property; as where a receiver, to satisfy his sureties, agreed that the rents should be paid into a bank to an account so kept that he could not by himself alone, without the concurrence of one of the sureties, promptly withdraw the money from the bank; and the bank having failed, he was held liable for the loss. (*White* v. *Blaugh*, 9 Bli. (N. S.) 181.) It has been laid down as clear that none may interfere with money or property in the hands of the receiver without the consent of the court, whether such interference be with the consent of the receiver or not. The receiver would not have received anything except under the order of the court, and the money is therefore strictly money belonging to the court, and the receiver can discharge himself only by paying obedience to its order. Where a receiver was ordered to pay certain tolls, as received, in the first instance to a corporation, but, under proceedings taken against him, had submitted to pay the money to the opposite party in the cause, such party was compelled to refund the money so received, and he and the receiver had to pay the

costs. (*De Winton* v. *Mayor of Brecon*, 6 Jur. (N. S.) 1046.) So it seems that a receiver, who has been ordered to pay a sum of money to a party, and who has that sum in his hands at the time when he is served with the order, but who wilfully and improperly refuses to pay it, will be ordered to pay interest on it from the date of the service of the orde. on him, and also all costs to which the party has been necessarily put by reason of his disobedience to the order. (*Fetnam* v. *Kirby*, 4 Ir. Eq. R. 320.)

Practice as to receiver.

IV.—The practice on and after the appointment of a receiver. There is not much on this subject in the Code of Civil Procedure itself; s. 505 gives the power of appointing receivers to the High Courts and District Courts, and subject to the consent and approval of the District Court, to the inferior courts; and s. 504 allows in some cases the collector to be appointed receiver of landed property. The following brief notes of the practice in English Courts may perhaps be useful as hints to our courts in India. It would seem that the motion for a receiver may be made at any stage in the suit, and need not be prayed for in the plaint; but the nature of the relief is not such, that it need, generally, be granted *ex parte* without notice to the opposite party. (*Malcolm* v. *Montgomery*, 2 Moll. 500; but see *Pare* v. *Clegg*, 7 Jur. (N.S.) 1136; *Taylor* v. *Eckersley*, 2 Ch. D. 302; 2 Dan. Ch. P. 1571.) But where a defendant is in default for non-appearance, or cannot be served, it would be otherwise. In one case where the insolvency of trustees was imminent, and a consequent loss of the trust estate was expected; and in another case, where a brother and sister were entitled equally to property under a will, and the brother the sole executor, had advertised part of the property for sale, and was about to leave the country; an *interim* receiver was appointed immediately upon the filing of the suit. (*H.* v. *H.*, 1 Ch. D. 276; *Colebourne* v. *Colebourne*, 1 Ch. D. 690.) In case of such pressing necessity, the form of the order made should be that A be appointed, *ex parte* and without security, as *interim* receiver till such a date, and that then, on giving security, a proper person be appointed receiver. (*Truman* v. *Redgrave*, 18 Ch. D. 547.) An objection to the plaint for want of form, or defect of parties, is not necessarily a sufficient ground for withholding an *interim* receiver. (*Evans* v. *Coventry*, 5 D. M. & G. 911.) The motion should be supported by affidavits, or other evidence, verifying such facts as constitute the

General rule of Code. Motion to appoint.

necessity for the receiver. The nature and value of the property to be affected should be specified; and it should be shown that the person proposed as receiver is a fit and proper person. Generally the receiver should be an indifferent person, not having any private interest involved in the management; but parties interested are sometimes appointed, and even parties to the suit, for their interest may not always conflict with due management. (*Meaden* v. *Sealey*, 6 Hare, 620.) In *Fuggle* v. *Bland* (11 Q. B. D. 711) the plaintiff was appointed receiver of the income of a wife's reversionary interest under a will, where the tenant for life was still living and plaintiff had recovered judgment for money lent to the defendants, husband and wife. Where the suit is between partners, and the nature of the business depends on personal qualities, and the plaintiff is more largely interested in the firm, he has been allowed to propose himself as receiver without salary. (*Sargant* v. *Read*, 1 Ch. D. 600; *Boyle* v. *Bettws L. C. Co.*, 2 Ch. D. 726.) In a suit for specific performance by a lessor against the lessee of a farm, where the lessee had entered but repudiated the agreement, and the farm was getting into a bad condition, the plaintiff, who could not otherwise have entered without prejudice, was appointed receiver and manager without security. (*Hyde* v. *Warden*, 1 Ex. D. 309.) A party to the suit when appointed, is so, generally, by consent of the other party only, and without salary. (*Allen* v. *Lloyd*, 12 Ch. D. 447; *Powys* v. *Blagrave*, 18 Jur. 462.) The next friend of an infant plaintiff will not be appointed; nor the plaintiff's solicitor, or one member of his firm, as he has a duty in watching the receiver; nor will a trustee be appointed except in a special case, and then without emolument. (*Stone* v. *Wishart*, 6 Mad. 64; *Sykes* v. *Hasting*, 11 Ves. 363; *Sutton* v. *Jones*, 15 Ves. 584; *Allen* v. *Lloyd*, 12 Ch. D. 447.)

Who should be.

As in the case of injunctions, a party is affected by notice of the order of the court as effectually as by formal service of it; and one who has such notice cannot evade the order by doing all the mischief in anticipation of the formal issue of it. Thus, it has been held that a receiver is entitled to all arrears of rent unpaid at the time when the order of reference for the appointment of a proper person as receiver is made; and although the tenants are only responsible from the time when the order to pay their rent to the receiver is served on them, yet the person entitled otherwise to receive such rent and arrears, is bound, from

Notice of appointment.

the date of the order of reference, to appoint a receiver, where he has notice of such order. (*Hollier* v. *Hedges*, 2 Ir. Eq. R. 370, N. S.)

Where the order is that "A, on giving security, be appointed receiver," the order is effective, as against third parties, only from the date of security being given, and the taking goods meanwhile in execution has been held not a breach of the order. (*Edwards* v. *Edwards*, 2 Ch. D. 296.) But as between the parties to the suit, the order operates from the date of its being made. (*Exp. Evans*, 13 Ch. D. 260.)

Applications for orders for receiver.

The receiver being an officer of the court, and not a party to the suit, the general rule in England is that any necessary application should be made, not by him, but by a party; but it would seem more convenient practice that the receiver should apply, but subject always to the parties having due notice. Where a receiver has exceeded his powers, the party affected thereby, though a stranger, ought not to bring a separate action to restrain the receiver, but should apply in the action in which the receiver was appointed. (*Searle* v. *Choat*, 25 Ch. D. 723); *Parker* v. *Dunn*, 8 Beav. 497; *Ireland* v. *Eade*, 7 Beav. 55.) A third person cannot apply for an order on the receiver, except through a party to the suit. (*Brocklebank* v. *E. L. Ry. Co.*, 12 Ch. D. 839.)

Taking the accounts.

In passing the accounts, the parties must have notice, and be able to attend when the receiver produces his vouchers, and his accounts are examined and tested by the proper officer of the court. But it is not necessary that a party interested, who objects to the application of moneys by the receiver, should wait till the time for passing his accounts has come, but he may at once apply, and the court will, if necessary, impound the funds, and leave the matter to be disposed of when the accounts are taken. (*De Winton* v. *Mayor of Brecon*, 6 Jur. N. S. 1046.) In case of neglect by the receiver to bring in or to pass his accounts, or to pay over the balance found due, any party interested may apply to the court to enforce obedience, which may be done either by proceeding upon the security-bond, or by such general process (if any) as the court may have for enforcing its orders. There seems to be no special provision on this point in the Code; in England the courts can attach the person of the receiver. All orders made in the matter of a receiver would seem to be open to appeal under s. 588 of the Code.

A receiver being appointed for the benefit of all parties, will not be discharged on the mere application of the party at whose instance he was appointed. (*Bainbridge* v. *Blair*, 3 Beav. 421.) One appointed for the benefit of two infants, tenants in common, will not be discharged on one of them coming of age. (*Smith* v. *Lyster*, 4 Beav. 227.) When a receiver is once appointed and has given security, he must show a reasonable cause to entitle him to be discharged, because he ought not to put the parties to the expense of a change (*Smith* v. *Vaughan*, Ridg. 251); so by the Roman law he could resign only *justissimâ causâ interveniente*. (Domat. B. 1, T. 7, s. 4, § 6.)

Discharge of receiver.

The sureties of a receiver cannot claim to be discharged at their own request, except perhaps under special circumstances. (*Griffith* v. *Griffith*, 2 Ves. Jr. 400.) Where one surety dies or goes abroad, and the receiver is unable to procure another, it is not, it seems, the practice to charge the receiver with the expense of his own discharge and the appointment of a new receiver. (*Lane* v. *Townsend*, 2 Ir. C. R. 120.) But where one surety seeks to be discharged, a consent, signed by the receiver and the remaining surety, should be lodged, stating that they consent that the surety should be discharged without prejudice to their own liability as to the past and future acts of the receiver. (*O'Keefe* v. *Armstrong*, 2 Ir. C. R. 115.)

Discharge of his sureties.

CHAPTER VIII.

OF THE ENFORCEMENT OF PUBLIC DUTIES.

45. Any of the High Courts of Judicature at Fort William, Madras and Bombay may make an order requiring any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or inferior Court of Judicature: provided—

Power to order public servants and others to do certain specific acts.

(*a*) that an application for such order be made by some person whose property, franchise or personal right would

be injured by the forbearing or doing (as the case may be) of the said specific act ;

(*b*) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or court in his or its public character, or on such corporation in its corporate character ;

(*c*) that in the opinion of the High Court such doing or forbearing is consonant to right and justice ;

(*d*) that the applicant has no other specific and adequate legal remedy ; and

(*e*) that the remedy given by the order applied for will be complete.

Nothing in this section shall be deemed to authorize any High Court—

(*f*) to make any order binding on the Secretary of State for India in Council, on the Governor-General in Council, on the Governor of Madras in Council, on the Governor of Bombay in Council, or on the Lieutenant-Governor of Bengal ;

Exemption from such power.

(*g*) to make an order on any other servant of the Crown as such, merely to enforce the satisfaction of a claim upon the Crown ; or

(*h*) to make any order which is otherwise expressly excluded by any law for the time being in force.

This section is wide enough in its terms to apply to a case where a person applies to a presidency magistrate for copies of the deposition of the witnesses and the orders recorded on a complaint and is refused permission to have them. An application made under this section to compel the magistrate to furnish such documents is not one "for the mere purpose of enforcing a penal law." If a prosecutor has a right to such copies his personal right would be injured if they were refused. (*Bank of Bengal* v. *Dinonath Roy*, I. L. R. 8 Cal. 166.) The courts will not make an order under this section unless it is shown among other things that the forbearing to do an act by any person holding a

public office or by any corporation or inferior court is clearly incumbent on such person or court in his or its public character, or on such corporation in its corporate character. When therefore it appeared that there was nothing approaching to a duty incumbent upon the chairman of the municipality to exercise any judicial discretion or judicial action with regard to the list of candidates for election, the court refused to compel the chairman to remove a particular candidate's name from the list of candidates. In this case it was doubted whether in such proceedings the rule should not have been issued in the first instance to the commissioners as a body instead of to the chairman, and whether the candidate whose name was objected to should not have also been served with the rule. (*In re Mutty Lall Ghose*, I. L. R. 19 Cal. 192.) The High Court has jurisdiction by a proceeding in the nature of a *quo warranto* to restrain a person, who has not been duly elected, from exercising the functions of a duly elected municipal commissioner. (*In the matter of Corkhill*, I. L. R. 22 Cal. 717.)

Clause (*d*).

Where a person bought some shares in a company, and the directors having refused to register him as a shareholder, he applied for an order under this section to compel them to do so, the court held that this section did not apply inasmuch as he had another "specific and adequate remedy" under s. 58 of the Indian Companies Act (VI of 1882). (*Gilbert, in re Bombay Fire Insurance Co., Ld.*, I. L. R. 16 Bom. 398.)

Application how made.

Procedure thereon.

46. Every application under section 45 must be founded on an affidavit of the person injured, stating his right in the matter in question, his demand of justice and the denial thereof; and the High Court may, in its discretion, make the order applied for absolute in the first instance, or refuse it, or grant a rule to show cause why the order applied for should not be made.

Order in alternative.

If, in the last case, the person, court or corporation complained of shows no sufficient cause, the High Court may first make an order in the alternative, either to do or forbear the act

mentioned in the order, or to signify some reason to the contrary and make an answer thereto by such day as the High Court fixes in this behalf.

Peremptory order.

47. If the person, court or corporation to whom or to which such order is directed makes no answer, or makes an insufficient or a false answer, the High Court may then issue a peremptory order to do or forbear the act absolutely.

Execution of, and appeal from, orders.

48. Every order under this chapter shall be executed, and may be appealed from, as if it were a decree made in the exercise of the ordinary original civil jurisdiction of the High Court.

Costs.

49. The costs of all applications and orders under this chapter shall be in the discretion of the High Court.

Bar to issue of *mandamus*.

50. Neither the High Court nor any Judge thereof shall hereafter issue any writ of *mandamus*.

Power to frame rules.

51. Each of the said High Courts shall, as soon as conveniently may be, frame rules to regulate the procedure under this chapter; and until such rules are framed, the practice of such court as to applications for and grants of writs of *mandamus* shall apply, so far as may be practicable, to applications and orders under this chapter.

The powers given by this chapter are to be exercised only by the High Courts, and this exercise is further confined to the local limits of the ordinary original civil jurisdiction of such courts. The powers conferred are very similar to those exercised through the old prerogative

writ of *mandamus* for which they are substituted. I do not presume to think that any remarks of mine would be of any value to either the bench or the bar of the High Courts in the exercise of these high constitutional powers; and I therefore purposely abstain from adding to the length of this work by entering upon any discussion of the subject of this chapter.

PART III.

OF PREVENTIVE RELIEF.

CHAPTER IX.

OF INJUNCTIONS GENERALLY.

52. Preventive relief is granted at the discretion of the court by injunction, temporary or perpetual.

Preventive relief, how granted.

53. Temporary injunctions are such as are to continue until a specified time, or until the further order of the court. They may be granted at any period of a suit, and are regulated by the Code of Civil Procedure.

Temporary injunctions.

A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit: the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

Perpetual injunctions.

The material sections of the Code which regulate the granting of temporary injunctions are ss. 492 and 493. The former relates to injunctions to prevent waste or loss pending litigation; and these may be spoken of as injunctions against waste *pendente lite*: the latter relates to temporary injunctions in either (1) cases of contract,

Division of the subject.

or (2) cases of tort; and though these are temporary, in that they are granted only for a specific time—generally till the hearing of the suit, or till further order—and really anticipate the decision of the question in issue between the parties, and may or may not result, when that has been decided, in the granting of a perpetual injunction; yet the *kinds* of cases, whether of contract or of tort, in which an injunction, either temporary or perpetual, may be granted, do not differ from each other; so that if the case, as alleged, be such that at the hearing a perpetual injunction would not be granted, then clearly a temporary injunction ought not to be granted before the hearing; though, of course, it does not follow that a temporary injunction will be granted, before the hearing, in every case in which a perpetual injunction might fitly be granted at the hearing; for to justify a temporary injunction, not only must the case be such that an injunction is the appropriate relief, but there must be the further ingredient that, unless the defendant is at once restrained by an injunction, irreparable injury or inconvenience may result to the plaintiff before the suit can be decided upon its merits. It seems to me, therefore, more convenient not to separate the consideration of temporary and perpetual injunctions in cases of contract or of tort, but to discuss the cases together, without regard to the kind of injunction sought.

I propose, therefore, to divide the subject as follows:—

I. Temporary injunctions against waste *pendente lite.*
II. Injunctions, both temporary and perpetual, in cases of contract.
III. Injunctions, both temporary and perpetual, in cases of tort.
IV. The practice as to injunctions, both temporary and perpetual.

Injunctions generally.

As to injunctions generally, it must always be borne in mind that the granting of them is a matter for the wise discretion of the court; and it has been well said that courts of equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which injunctions shall be granted or withheld. And there is wisdom in this course; for it is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights or redress wrongs. The jurisdiction thus operating by way of injunctions is manifestly indispensable for the purposes of social justice in a great variety of cases, and therefore should be fostered and upheld by a steady confidence. At the same time it must be admitted that the exercise of it is attended with no small danger both

from its summary nature and its liability to abuse, It ought, therefore, to be guarded with extreme caution, and applied only in very clear cases; otherwise, instead of becoming an instrument to promote the public as well as private welfare, it may become a means of extensive and irreparable injustice. (2 Story's Eq. 959.)

I. Against waste *pendente lite.*

I. Temporary injunctions to prevent waste *pendente lite.*

Provisions of the Code.

The words of s. 492, Civil Procedure Code, are that "if in any suit it be proved by affidavit or otherwise—(*a*) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or (*b*) that the defendant threatens, or is about to remove or dispose of his property with intent to defraud his creditors," the court may grant a temporary injunction, or give such other order as it thinks fit, to prevent the anticipated injury. In this section, clause (*b*) which presupposes on the part of the defendant a general intention to defeat his creditors, and permits of an injunction analogous to the remedy of attachment before judgment provided in ch. xxxiv of the Code, need not be considered here. The wrongful sale of property in execution of a decree is only one form of alienation which may be restrained *pendente lite*, and does not seem to call for any special remark beyond this, that though even a judicial sale—and that, too, it would seem, though between other parties—is not exempt from being restrained, yet it is not every such sale, but only a wrongful one, that will be restrained. Lastly, it must be noticed that the court is not limited to an injunction, but may, instead, give such other order as may seem better adapted, in the special circumstances of the case, to effect the object of the section; but this alternative power may also be here omitted from further consideration.

Purpose and scope of the relief.

Subject to the above remarks, the power given by this section is substantially the same as that long exercised by English courts of equity. The object is to restrain the defendant from doing anything which may prevent the property remaining *in statu quo* during the pendency of a suit, upon the principle that when the plaintiff seeks to recover property *in specie*, the defendant shall not be allowed to decide the question in his own favour by making away with the property, the right to which is the question in dispute; for the ordinary rule is that

pending a suit to enforce a general claim against a man, there cannot be an injunction to restrain him from parting or dealing with his property, not being property specifically in dispute in the suit. (*Robinson* v. *Pickering*, 16 Ch. D. 606.) Within this principle of remedial justice falls, as well the vexatious alienation of real property *pendente lite*, as also the transfer of movables, such as negotiable securities, stock, and such like *indicia* of property; the improper payment of money in violation of a trust, or where it would be injurious to the party to whom it belongs; and the transfer of diamonds, heirlooms, and such like specific chattels of peculiar intrinsic value, or, from their nature, not capable of being compensated for by any money payment (2 Story's Eq. 905-8). Even land may be seriously and irreparably damaged *pendente lite*, as by changing it from irrigated into dry land, or *vice versâ*; and a spiteful defendant in possession, but conscious of an infirm title, might be guilty of such an act. So immovables in the shape of buildings, irrigation or other works, or timber and forests, are obviously even more exposed than land to waste or damaged during litigation.

Vexatious alienation restrained.

Besides waste or damage, the mere alienation of even immovable property may, under some circumstances, be productive of so much possible injury or embarrassment to the plaintiff as to justify the issue of an injunction. As a general rule, all *vexatious* alienations pending a suit ought to be restrained. (*Daly* v. *Kelly*, 4 Dow, 440; *Echliff* v. *Baldwin*, 16 Ves. 267.) So where a purchaser of copyhold lands had been let into possession, and had paid part of the purchase-money, but the surrender necessary to complete the title had not been made, and there was danger that the defendant would surrender in favour of others, he was restrained from so embarrassing the purchaser, who was suing for specific performance. (*Spiller* v. *Spiller*, 3 Swans. 556; *Curtis* v. *Buckingham*, 3 V. & B. 168.) The case of *Spiller* v. *Spiller* was followed in *London & C. B. Co.* v. *Lewis* (21 Ch. D. 490), where plaintiffs were equitable mortgagees and suing for foreclosure and the defendants the heirs-at-law in whom was the legal estate, had refused to make any arrangement with the plaintiff. It was held that *lis pendens* was not a sufficient protection. Again, where two railway companies agreed to amalgamate, and to make their lines in union, and one company was about to make and dispose of their line otherwise, an injunction was granted. It was there said: "It is certain that

the court will, in many cases, interfere and preserve property *in statu quo* during the pendency of a suit, in which the rights to it are to be decided, and *that* without expressing, and often without having the means of forming, any opinion as to such rights. It is true that no purchaser *pendente lite* would gain a title, but it would embarrass the original purchaser in his suit against the vendor, which the court prevents by its injunction. It is true that the court will not so interfere if it thinks that there is no real question between the parties, but seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favour of plaintiff. If the suit shows a substantial question between the parties, the title to the injunction may be good, although the title to the relief prayed may ultimately fail." (*G. W. Ry. Co.* v. *B. & O. Ry. Co.*, 2 Phil. 597.) Still in such cases, it is not enough that there is a point to be decided which the plaintiff is fairly raising, for there is a further question, namely, whether *interim* interference on a balance of convenience or inconvenience to the one party or the other, is or is not expedient. Where the alternative is interference or probable destruction of the property, then, of course, the court will be very ready to lend its immediate assistance, even at considerable risk that it may be encroaching on what may turn out eventually to be the legal rights of the defendant. (*Wilson* v. *Wilson*, 1 H. L. C. 538.) But if the injury threatened to the plaintiff is limited to his being retarded or embarrassed by the new contract or deed, the court will more readily listen to suggestions by the defendant that his rights will be prejudiced by interference. (*Shrewsbury & C. Ry. Co.* v. *S. & B. Ry. Co.*, 20 L. J. 574, Ch.) *Allgood* v. *M. Q. D. Ry. Co.* (33 Ch. D. 571) was a singular case of an injunction used to protect and enforce a vendor's lien. The defendant had agreed to buy the plaintiff's land and made their line on it; they neglected to pay the price, and the land had ceased to be saleable. An injunction was granted to prevent the defendant company running their trains until they had paid the money.

Cases of ejectment and pure trespass distinguished.

The preceding cases are very distinguishable from another class in which the defendant is in possession, and the plaintiff seeks to eject him, the sole question between them being as to the title to the land; and where, if this be in the plaintiff, the defendant is a mere

trespasser. On the other hand, this class of cases (which may be described as ordinary ejectment cases) is to be distinguished from a class of cases falling under the head of torts, where the injury is a trespass or forcible invasion of plaintiff's possession of his property. In cases where the relief sought is ejectment, our courts in India may clearly, by means of an injunction, secure the property from damage during litigation. The English courts, from special reasons, long hesitated as to these cases. As a general rule, it may be laid down in such cases that a court is bound to interfere by injunction to prevent serious damage or waste tending to change the nature and value of the property, such as the destruction of works of irrigation, the removal of principal buildings, cutting down timber unfit for use, or adapted only for ornament, or briefly to prevent anything that amounts to mischievous or malicious waste. (*Lowndes* v. *Bettle*, 10 Jur. N. S. 226.) At the same time care must be taken lest, by interfering with the ordinary rights of ownership, the mere institution of a suit should operate as a vexatious interruption to the enjoyment of property. Thus, there should be some peculiar and strong grounds to justify an injunction to restrain from such acts as cutting down timber in a husbandlike manner, continuing to work a quarry, using brick-earth, and so on. Thus, where the contest was as to the right to certain coal mines, and the plaintiff sought an injunction to restrain the defendants meanwhile from working the mines this was refused, the court saying, "the defendants, who claim a right to do what they are doing, are, it is true, by working the coal, taking away the very substance of the property, which may in a sense be perhaps called in this case, and might in others most certainly be, waste or destruction; but, on the other hand, it is the only mode in which the property in question can be usefully enjoyed or made available, and may, therefore, in a sense, perhaps, be deemed not more than taking the ordinary usufruct of the thing in dispute; nor is unskilful or unminerlike working established against the defendants to my satisfaction, nor are they said to be insolvent." (*Haigh* v. *Jaggar*, 2 Coll. C. C. 231.)

Cases of waste to movable property.

Next, as to cases in which the subject-matter in dispute is movable property. The ground of interference with the ordinary rights of the possessor and apparent owner of a chattel to alienate it or change its character, is that otherwise some irreparable or grievous damage will ensue to the plaintiff, and that he has shown a *primâ facie* good

claim to the assistance of the court; as that a negotiable security was obtained from him by fraud, or is founded upon some illegal consideration, and the holder has actual or constructive notice of such defect; or that the party in possession is not the real owner, but a trustee, bailee or stake-holder on behalf of plaintiff, and is about to act in violation of his trust or other authority. So a specific chattel may be possessed of peculiar value incapable of being measured by a money-compensation, as where it is an heirloom, and so on; and generally in any suit under s. 11 of this Act, an injunction *pendente lite* might be a very necessary and proper precaution.

Examples of such relief.

There have been many examples of injunctions affecting movable property; thus, where a promissory note for £2,000 had been given under a marriage brokage agreement—a kind of contract greatly disfavoured in English law, as injurious to the welfare of society, and which in India should probably be also viewed as "opposed to public policy" (s. 23, Indian Contract Act)—the defendant was restrained from parting with it. (*Smith* v. *Aykwell*, 3 Atk. 566.) This case is suggestive of how an injunction *pendente lite* may be properly applied in aid of the relief to be granted under ch. iv of this Act. So, in this way, the negotiation has been restrained of bills shown to have been bad in their inception by being given for the amount of a gambling debt; and of securities ostensibly given for goods sold, but really as a mere pretext for a loan at an usurious rate, contrary to then existing law, as part of an unconscionable bargain with an expectant heir. (*Lloyd* v. *Gordon*, 2 Swans. 180; *King* v. *Hamlet*, 4 Sim. 223.) In another case, where bankers were the holders of a bill of exchange for which they had given valuable consideration, but with notice that it had been improperly accepted by a partner of the plaintiff, in the partnership name, the court said that it was quite a case for interfering to restrain its negotiation, observing: "This bill of exchange, if it passed by negotiation into the hands of a third person, who had no notice of the circumstances under which it came into the possession of the bankers, would be as good a bill of exchange as any person could desire to have, and from that danger and the mischief attending it, the plaintiffs have a right to be protected. It is true that even if the court were not to act, they could still have the security of *lis pendens*. But it is quite a new doctrine that a security like that—which is far from being the best that a prudent

man would wish to have—is to deprive the suitor of the more effective protection of an injunction, or that the court, because it acts on the doctrine of *lis pendens*, will not prevent (if possible) the necessity of proceeding on such a principle." (*Hood* v. *Aston*, 1 Russ. 412.)

Where there had been a settlement of family property between a father and son, giving the latter an interest; and afterwards when the son had become insolvent, this was revoked, and a fresh settlement made, giving to the father the full power of appointment; in a suit by the creditors of the son to set this aside as in fraud of them, the father was *pendente lite* restrained from exercising his power in favour of purchasers but not of volunteers; for it was said: "This deed would give the father power to settle the estate upon any of his family, or to convey it away to a stranger for valuable consideration. Now it would be inequitable that the father should be restrained from exercising the power in favour of his own family, because he might die before the question as to the validity of this deed is decided, and a great injustice might be done to other members of his family. On the other hand, it would be unjust to the plaintiffs if he were allowed to exercise his power so as to dispose of the estate for value, as in that case, whether the plaintiffs would be able to establish their rights or not against a purchaser, they would have another party to introduce into the bill, and other interests to contend with." (*Beyfus* v. *Bullock*, L. R. 7 Eq. 393.)

In another case, A, the guardian of the plaintiff, his niece, obtained from her by misrepresentation and undue influence, her indorsement in blank to a note drawn by him in her favour; and this he then paid over to B & Co., who in turn paid it into their bankers, the defendants, who were also the bankers of A, and knew that he was insolvent, and also his position towards plaintiff, and yet placed the note to the credit of B & Co., without inquiry. The court interfered on the ground that apparently the note had been acquired by the exercise of undue influence of the uncle over his niece; that the bankers, though they knew of the relation between the parties and the insolvent circumstances of the uncle, did not make any inquiry whatever of the young lady herself, nor did they inquire of the persons who brought the note, whether any consideration had been given for it; but they contended themselves with ascertaining that the young lady was of age, and possessed of a large fortune: and there being thus no probability that the money was in danger, the bankers were restrained. (*Maitland* v. *Backhouse*, 16 Sim. 58.) There was the like interference in another case, in

which it was held that the bill "was taken under circumstances which were calculated to raise suspicion, and ought to have occasioned inquiry; and that there was no necessity for proving such a case, and much less for showing that the defendants knew of the illegal consideration, in order to sustain the injunction." (*Portalington* v. *Soulby*, 3 My. & K. 104.) In another case, a bill for £500 was drawn by A & Co., upon plaintiffs, payable to B or order; and C, the agent of B, without authority and fraudulently, endorsed thereon the name of B, and passed it to one S, who sold it to defendant, who took it without any knowledge of the fraud, or suspicion of the genuineness of the indorsement, and paid full value for it. As soon as the bill had thus been put into circulation, it was transmitted to, and duly accepted by, the plaintiff. But on the fraud of C being subsequently discovered, there was an injunction to restrain the defendant from dealing with the bill, the indorsement under which he held being a forgery, and so giving him no title. (*Esdaile* v. *La Nauze*, 1 Y. & C. 394.) So, the transfer of stock, shares and such like *indicia* of property has been restrained pending litigation. Thus, where a steward was under strong suspicion of having invested large sums received by him for rents, in stock in his own name, he was restrained from transferring any stock in his name, for though all the stock was not supposed to have been the plaintiff's money, and the plaintiff had been grossly negligent, yet the sum was very large, £60,000, and great part of it was suspected to have been embezzled; but the injunction was not extended to the balance at defendant's bankers, though that was also large. The case has been thought to be strong one. (*Chedworth* v. *Edwards*, 8 Ves. 46; but see *Cox* v. *Paxtons*, in 1 Mad. Ch. Pr. (3rd ed.) 215 note.) A more questionable case was where a purchaser sought to set aside, on the ground of fraud, a sale of large ironworks, of which the purchaser was and had long been in possession, and the purchase-money for which the seller had invested in stocks, which he had transferred into his mother's name, apparently without consideration; and an injunction was granted to restrain the transfer of the stock till the suit was decided. But this was to give the purchaser the security for the return of his money in addition to the possession of the estate, and was certainly a strong proceeding. This case went off on another ground, and so the point was not fully decided. (*Small* v. *Attwood*, 1 Younge, 533; see Sugden's V. & P. 215-16, and *Ashwin* v. *Burton*, 9 Jur. N. S. 319.)

Other cases in which this relief has been granted have been to prevent the transfer of shares in a ship, where the seller was a trustee for others; and the transfer of stocks, where there was a controversy respecting the title to them under different wills. (*Armstrong* v. *Armstrong*, 21 Beav. 71; *King* v. *King*, 6 Ves. 172.) So also an injunction will be granted where a trustee or agent attempts to transfer stock for his own benefit, and to the injury of the person beneficially entitled to it; or to restrain the payment of money, where it is injurious to the party to whom it belongs; or where it is in violation of the trust to which it should be devoted. (2 Story's Eq. 907.)

Cases within s. 11.

Another class of cases, in which the precaution of an injunction *pendente lite* is very often necessary, is where the suit is for the delivery of specific goods under s. 11 of this Act. Thus where the subject-matter of the suit was ancient family pictures, furniture, and other articles of a peculiar nature and value, which the husband's creditors were seeking to sell, but which, as the wife alleged, belonged to her, such an injunction was granted, as indispensable from the very nature of the property in question. (*Arundell* v. *Phipps*, 10. Ves. 139.) And generally where a fiduciary relation subsists between the parties, whether it be the case of an agent, or a trustee, or a broker, or whether the subject-matter be stock, or cargoes, or chattels of whatever description, the court will interfere to prevent a sale, either by the party intrusted with the goods, or by a person claiming under him, through an alleged abuse of power. As where there was great reason to believe that A never had any right to the goods except as the plaintiff's agent, and defendant alleged that he had purchased them under circumstances which gave him a title at law to them. (*Wood* v. *Rowcliffe*, 2 Phil. 382; Illustration to clause (*a*), s. 11.) In another case, the sale of a number of railway waggons, as being articles of a peculiar nature not easily replaced, was restrained during the suit. (*North* v. *G. N. Ry. Co.*, 2 Giff. 64.) So, where the plaintiff was executrix of a will, and defendants were the representatives of a co-executor, and were in possession of various papers and deeds belonging to the testator's estate, an injunction was granted at once to restrain the defendants from parting with the documents in their possession, and from preventing the plaintiff and her solicitor from having access to the documents at all reasonable times, and after reasonable notice. (*Goodall* v. *Goodall*, 16 Jur. 316.)

CHAPTER X.

OF PERPETUAL INJUNCTIONS.

Perpetual injunctions, when granted.

54. Subject to the other provisions contained in, or referred to by, this chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication.

When such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II of this Act.

When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of property, the court may grant a perpetual injunction in the following cases (namely):—

(*a*) where the defendant is trustee of the property for the plaintiff;

(*b*) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(*c*) where the invasion is such that pecuniary compensation would not afford adequate relief;

(*d*) where it is probable that pecuniary compensation cannot be got for the invasion;

(*e*) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

EXPLANATION.—For the purpose of this section, a trademark is property.

Illustrations.

(*a*) A lets certain land to B, and B contracts not to dig sand or gravel thereout. A may sue for an injunction to restrain B from digging in violation of his contract.

(*b*) A trustee threatens a breach of trust. His co-trustees, if any, should, and the beneficial owners may, sue for an injunction to prevent the breach.

(*c*) The directors of a public company are about to pay a dividend out of capital or borrowed money. Any of the shareholders may sue for an injunction to restrain them.

(*d*) The directors of a fire and life insurance company are about to engage in marine insurances. Any of the shareholders may sue for an injunction to restrain them.

(*e*) A, an executor, through misconduct or insolvency, is bringing the property of the deceased into danger. The court may grant an injunction to restrain him from getting in the assets.

(*f*) A, a trustee for B, is about to make an imprudent sale of a small part of the trust-property. B may sue for an injunction to restrain the sale, even though compensation in money would have afforded him adequate relief.

(*g*) A makes a settlement (not founded on marriage or other valuable consideration) of an estate on B and his children. A then contracts to sell the estate to C. B or any of his children may sue for an injunction to restrain the sale.

(*h*) In the course of A's employment as a vakil, certain papers belonging to his client, B, come into his possession. A threatens to make these papers public, or to communicate their contents to a stranger. B may sue for an injunction to restrain A from so doing.

(*i*) A is B's medical adviser. He demands money of B, which B declines to pay. A then threatens to make known the effect of B's communications to him as a patient. This is contrary to A's duty, and B may sue for an injunction to restrain him from so doing.

(*j*) A, the owner of two adjoining houses, lets one to B and afterwards lets the other to C. A and C begin to make such alterations in the house let to C as will prevent the comfortable enjoyment of the house let to B. B may sue for an injunction to restrain them from so doing.

(*k*) A lets certain arable lands to B for purposes of husbandry, but without any express contract as to the mode of cultivation. Contrary to the mode of cultivation customary in the district, B threatens to sow the lands with seed injurious thereto and requiring many years to eradicate. A may sue for an injunction to restrain B from sowing the lands in contravention of his implied contract to use them in a husband-like manner.

(*l*) A, B and C are partners, the partnership being determinable at will. A threatens to do an act tending to the destruction of the partnership-property. B and C may, without seeking a dissolution of the partnership, sue for an injunction to restrain A from doing the act.

(*m*) A, a Hindu widow, in possession of her deceased husband's property, commits destruction of the property without any cause sufficient to justify her in so doing. The heir-expectant may sue for an injunction to restrain her.

(*n*) A, B and C are members of an undivided Hindu family. A cuts timber growing on the family property, and threatens to destroy part of the family house and to sell some of the family utensils. B and C may sue for an injunction to restrain him.

(*o*) A, the owner of certain houses in Calcutta, becomes insolvent. B buys them from the official assignee and enters into possession. A persists in trespassing on and damaging the houses, and B is thereby compelled, at considerable expense, to employ men to protect the possession. B may sue for an injunction to restrain further acts of trespass.

(*p*) The inhabitants of a village claim a right of way over A's land. In a suit against several of them, A obtains a declaratory decree that his land is subject to no such right. Afterwards each of the other villagers sue A for obstructing his alleged right of way over the land. A may sue for injunction to restrain them.

(*q*) A, in an administration-suit to which a creditor, B, is not a party, obtains a decree for the administration of C's assets. B proceeds against C's estate for his debt. A may sue for an injunction to restrain B.

(*r*) A and B are in possession of contiguous lands and of the mines underneath them. A works his mine so as to extend under B's mine, and threatens to remove certain pillars which help to support B's mine. B may sue for an injunction to restrain him from so doing.

(*s*) A rings bells or makes some other unnecessary noise so near a house as to interfere materially and unreasonably with the physical comfort of the occupier B. B may sue for an injunction restraining A from making the noise.

(*t*) A pollutes the air with smoke so as to interfere materially with the physical comfort of B and C, who carry on business in a neighbouring house. B and C may sue for an injunction to restrain the pollution.

(*u*) A infringes B's patent. If the court is satisfied that the patent is valid and has been infringed, B may obtain an injunction to restrain the infringement.

(*v*) A pirates B's copyright. B may obtain an injunction to restrain the piracy, unless the work of which copyright is claimed is libellous or obscene.

(*w*) A improperly uses the trade-mark of B. B may obtain an injunction to restrain the user, provided that B's use of the trade-mark is honest.

(*x*) A, a tradesman, holds out B as his partner against the wish and without the authority of B. B may sue for an injunction to restrain A from so doing.

(*y*) A, a very eminent man, writes letters on family topics to B. After the death of A and B, C, who is B's residuary legatee, proposes to make money by publishing A's letters. D, who is A's executor, has a property in the letters, and may sue for an injunction to restrain C from publishing them.

(*z*) A carries on a manufactory and B is his assistant. In the course of his business A imparts to B a secret process of value. B afterwards demands money of A, threatening, in case of refusal, to disclose the process to C, a rival-manufacturer. A may sue for an injunction to restrain B from disclosing the process.

The granting of injunctions is now regulated by ss. 54 and 55. These sections have never been understood as introducing new principles of law into India, but rather as an attempt to express in general terms the rules acted upon by courts of equity in England, and long since introduced in this country, not because they were English law, but because they were in accordance with equity and good conscience. (*Per* Wilson, J., *Shamnugger Jute Factory* v. *Ram Narain*, I. L. R. 14 Cal. 189—199.)

In regard to temporary injunctions either in cases of contracts, or in cases of tort,* s. 493 of the Code provides that in any suit for the purpose of restraining a breach of contract, or other injury, and whether damages are sought or not, a temporary injunction may, at any stage in the suit, either before or after judgment, be granted "to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of like arising out of the same contract or relating to the same property or right." This may be subject to such terms, as to keeping an account and so on, as the court thinks fit.

Similarly, this s. 54 is common to perpetual injunctions both in cases of contract and in cases of tort. The second paragraph provides that, in cases of contract, the rules and provisions of ch. ii shall be applied, when the relief sought is a perpetual injunction; for it will be seen that, in a vast number of cases of contract an injunction is in effect a specific performance of the contract. The third paragraph and the clauses (*a*) to (*e*) seem intended to apply only to cases of tort, but clauses (*a*) to (*d*) which enunciate the general principles governing the grant of an injunction in such cases are precisely similar, *mutatis mutandis*, as clauses (*a*) to (*d*) of s. 12, enunciating the like principles in cases of contract. Clause (*e*) of s. 54 is rather a matter of

* The term *tort*, though archaic, is convenient. In this Act the term *obligation* involves every duty whether arising out of contract or otherwise, and as the term *injury* involves every invasion of a right, or in other words the breach of any duty, whether arising out of contract or otherwise, it seems convenient to retain the term *tort* as denoting any injury not arising out of contract.

procedure than of substantive law. Of the Illustrations to this section, Illustrations (*a*), (*j*), (*k*) and (*l*) are purely cases of contract, and Illustrations (*b*) to (*i*) are examples of breaches of duty arising out of contract, being breaches of trust or other fiduciary relation. The remaining Illustrations (*m*) to (*z*) are all cases of tort.

The other sections of ch. x.

Of the remaining sections, in this chapter, s. 55 is limited to a particular kind of injunctions, known as Mandatory Injunctions, applicable to cases both of contract and of tort; s. 56 sets out general defences in suits for an injunction, also applicable to cases either of contract or of tort; and s. 57 is limited to a particular class of contracts in which an injunction operates, either partially, or indirectly, as a specific performance. Omitting for the present all matter falling under these three sections, I will proceed to consider injunctions generally, firstly, in cases of contract, and then in cases of tort.

Injunctions in cases of contract.

II. Injunctions, both temporary and perpetual, in cases of contract.

As already noticed, cases to which an injunction, whether temporary or perpetual, is applicable, differ only in this, that to justify a temporary injunction, the necessity for the preventive relief must be shown to be pressing and immediate. We need not, therefore, further separate the cases.

Where a court interferes, by means of an injunction, to restrain a party from the committal of a breach of contract, or the repetition of a breach, it is obvious that, in many cases, this interference is equivalent to decreeing the specific performance of the whole contract. This will be so, when the duty imposed by the contract upon the party to be restrained by the injunction, consists solely in abstaining from doing a certain act, as where he has contracted not to carry on a particular trade within particular limits. In other cases, the injunction may operate only in aid of a decree for specific performance. Hence, the principles that govern the grant or refusal of specific performance, will be equally applicable to cases of injunction; though the question, whether or not an injunction ought to be granted is generally a far less complex question whether or not specific performance ought to be decreed. These principles have already been so fully discussed in ch. ii, that I do not propose to follow here the order of the sections in that chapter, but to classify the cases of contract in which the relief of an

Arrangement of the subject.

injunction is appropriate, beginning with the simplest cases. I will take, therefore, firstly, cases of simple negative covenants; secondly, cases in which the injunction is applied in support of one or more covenants forming part of a contract, as in cases between landlord and tenant; thirdly, cases between partners, where the injunction is granted in aid either of express covenants, or of the duties arising out of the relation of partnership; and lastly, cases in which the injunction is in aid of the obligations arising out of any fiduciary relation between the parties.

Cases of negative covenants.

Firstly, cases of simple negative covenants. An early example of this is where plaintiffs, in consideration that the ringing of a church bell at a certain hour in the morning should be discontinued for their lives, and the life of the survivor of them, had erected a new cupola, clock, and bell for the church, an injunction against a breach of the contract operated as a specific performance of it. (*Martin* v. *Nutkin*, 2 P. Wms. 266.) A large class of cases of this kind is that of covenants against exercising a trade or profession within certain limits. The general rule, as to what covenants of this nature are enforceable, is laid down in Indian Contract Act, s. 27. In the case of a sale of the good-will of a business, or an agreement among partners, such a contract may, under certain conditions, be enforced, but, as a general rule, all contracts restraining the exercise of a lawful trade or profession are void. In England such a restraint is often imposed upon young men taken as pupils or apprentices to learn a business, but these cases are not excepted by s. 27, Indian Contract Act. The mere sale of the good-will of a trade, unless there is an express covenant to the contrary, imposes no obligation on the vendor to forbear the exercise of the same trade. (*Shackle* v. *Baker*, 14 Ves. 468; *Kennedy* v. *Lee*, 3 Mer. 452.) But though there be no covenant, the court will interfere to prevent any such fraud as, after the sale of such good-will attempting to set up the same trade in the same place, under the same sign or name, the party giving himself out as the same person, or as carrying on the old concern; or where from the circumstances it appears that the defendant gave encouragement, generating a confidence that he would not engage in such a trade, and so inducing other persons to involve themselves. (*Crutwell* v. *Lye*, 17 Ves. 335; see on this subject further under s. 57.) Where the defendants, who were the owners of a public building, had let a stall therein to the plaintiff,

with a covenant that he alone should be allowed to sell certain kinds of goods within the building to the public, they were restrained by an injunction from allowing others to sell like goods at their stalls. (*Altman* v. *Royal Aquarium Society*, 3 Ch. D. 228.) Where there is a covenant, an evasion, as well as a direct breach, will be restrained; as where defendant had covenanted not to trade as a carrier from A to B, he was restrained from trading as a carrier from C through A to B. (*Williams* v. *Williams*, 2 Swan. 253.) So where the evasion was that defendant afterwards carried on the same trade within the prescribed limits, not ostensibly on his own account, but as manager for a near relation. (*Jones* v. *Heavens*, 4 Ch. D. 636.) With regard to temporary injunctions in these cases, there is this caution to be borne in mind, that while, on the one hand, if the court does not interpose, the plaintiff cannot possibly have what he really intended to purchase; on the other hand, if the defendant has a right to carry on this trade, it may, by interfering, destroy that right to an extent which could never be remedied. (*Crutwell* v. *Lye*, 17 Ves. 335.)

Such covenants annexed to transfer of land.

It often occurs that a negative or restrictive covenant is annexed on the sale or demise of land. Thus, where several lots of lands were sold for building purposes, with mutual covenants that in front of each house to be built, a certain width of land should be kept free of buildings, and laid out as a garden, plaintiffs had an injunction to restrain the defendants from building in a manner contrary to the general scheme for the benefit of all the original parties. (*Coles* v. *Sims*, 1 Kay, 56.) So where there was a covenant between the vendor and purchaser of the central part of a square in London, that the purchaser and his assignees should use the land as a garden, and not build thereupon, the covenant was enforced by means of an injunction against a subsequent purchaser with notice, who was proceeding to build upon the land. (*Tulk* v. *Moxhay*, 2 Phill. 774.) Cases of this kind are very numerous, and both on sales, and in leases, especially for long terms for building purposes, covenants have been enforced, such as not to build so as to obstruct a particular view; not to build on part of the land; not to allow houses built on other parts of the same owner's land, or the house to be built by the purchaser on his part of the land, to be used for certain trades or business; and so on. (*Piggott* v. *Stratton*, 1 John, 341; *Rankin* v. *Huskisson*, 4 Sim. 13; *Hodson* v. *Coppard*, 7 Jur. N. S. 11; *Jay* v. *Richardson*, 30 Beav. 563; *Catt* v. *Tourle*,

L. R. 4 Ch. 654; *Richards* v. *Revitt*, 7 Ch. D. 224; *German* v. *Chapman*, 7 Ch. D. 271; *Taite* v. *Goslin*, 11 Ch. D. 273; *Western* v. *Macdermott*, L. R. 2 Ch. 72; *M'Lean* v. *M'Kay*, L. R. 5 P. C. 327; *Nicoll* v. *Fenning*, 19 Ch. D. 258; *Nottingham Patent Co.* v. *Butler*, 16 Q. B. D. 778; *Martin* v. *Spicer*, 34 Ch. D. 1; S. C. 14 Ap. Cas. 12; *Collins* v. *Castle*, 36 Ch. D. 243; *Hall* v. *Ewin*, 37 Ch. D. 74; *Tod Heatley* v. *Benham*, 40 Ch. D. 80.)

General principle indicated.

Cases of this class are often complicated by the fact that the party seeking to enforce the covenant, or against whom it is sought to be enforced, is not the original covenantee or covenantor (as the case may be), but his successor in title. In discussing s. 23, clauses (*e*) and (*f*), I have considered at some length when covenants of this kind "run with the land," to use an English law term; and of course those clauses apply fully to injunctions under s. 54 in the same cases. To what I then said, I will now only add, that a court of equity must act, not upon any technical rule of real property law as to whether a covenant runs with the land or not, but upon the broad principle, that a party shall not be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Hence, in the case of mutual covenants containing restrictive stipulations, there being thus an agreement, all persons who come in under those who took with notice of the covenants, are equally bound by them. But obviously, in each case, we must be careful to ascertain what, at the time it was made, was the limit of the agreement. Thus, where A sold two small portions of his land to B, and there were restrictive covenants imposed upon B, for the benefit of A, the proper limit of the agreement was clearly to benefit the rest of A's estate, but not to burden it, nor to restrict A's liberty to deal with the land which he retained, as he might think fit. Hence, the mere fact that A subsequently sold other portions of his estate to third parties, could not, unless it was shown that they bought with knowledge of, and subject to, the benefit of such covenants by B, prevent A from afterwards releasing B from those covenants. And therefore, when A afterwards repurchased from B the land which he had sold to him, A was not, in respect to the land so repurchased, bound, in favour of such intermediate third parties, by the covenants made by B. (*Keates* v. *Lyon*, L. R. 4 Ch. 218.) Similarly, where A owning a house and lands, sold land adjoining to B, with

restrictive covenants on B's part as to building, and afterwards A sold to C without referring to the covenants with B, and then C sold to plaintiff, it was held that the covenants with B were solely for the benefit of A, so that he might hereafter make the most of what he retained; that it was not a case of mutual restrictive covenants by several purchasers so as to bind successors in title, and that plaintiff could not enforce B's covenants against his successor, C not having bought from A with a bargain for the benefit or even with a knowledge of such covenants by B, and further not having bought all the land retained by A after the sale to B.

In plaintiff's conveyance there was a covenant limiting their use of the purchased property, but such covenant was not co-extensive with the covenants of B. (*Renals* v. *Cowlishaw*, 9 Ch. D. 124; 11 Ch. D. 866; generally approved in *Spicer* v. *Martin*, 14 Ap. Cas. 12.) Hence, also, a landlord is not a trustee for his tenants *inter se*, and cannot be required, by one, to enforce, against another, covenants which the landlord has made with the latter for his own benefit and which, though beneficial to the other tenant, were not communicated to him, and did not form part of his contract with his landlord. Thus, where there is a lease to A with restrictive covenants as to building, and then a lease to B of adjoining land, but B takes not knowing of and without reference to the covenants made by A, B cannot compel the landlord to enforce against A his covenants. (*Master* v. *Hansard*, 4 Ch. D. 718; *Kemp* v. *Bird*, 5 Ch. D. 978.)

In respect to these restrictive covenants, which sometimes extend to minute details, it may be well to observe that, if there be a contract duly entered into between the parties, it is no answer to a violation of it to say that it will not inflict any injury upon one of the contracting parties, or even to prove that it may be beneficial. It is for the party to judge whether the agreement shall be preserved, so far as he is concerned, in its integrity, or whether he shall permit it to be violated. It is therefore of no moment that there is no evidence of any actual damage. If the act of the defendant be a violation of the contract, the plaintiff is entitled to protection, and to the enjoyment of the right he has purchased. (*Dickenson* v. *Grand Junction Canal Co.*, 15 Beav. 260; *Attorney-General* v. *Mid. Kent, &c., Co.*, L. R. 3 Ch. 100; *Manners* v. *Johnston*, 1 Ch. D. 673.) In a purely personal contract, an injunction may also operate as a specific performance, as where there is a contract to assign a pension or salary,

and the injunction restrains the assignee from drawing the pension or revoking the power of attorney to receive it. (*Knight* v. *Bulkeley*, 27 L. J. 592, Ch.; *Lloyd* v. *Eagle*, 28 L. J. 389, Ch.) A rather singular instance in which an injunction was granted to enforce a personal contract consisting of a negative covenant, was a case where tenders for a supply of stone having been invited by X, it was agreed between A, B, C and D, quarry owners, that B should not tender, that C and D should tender above A's price, that A should purchase certain quantities of stone from B, C, and D at a fixed price, and that B, C and D should not supply X with stone. The stone was purchased, as agreed, by A, but B, in breach of his agreement, sent in a tender which was accepted. But at the suit of A, B was restrained from supplying stone to X, thus leaving B liable to X in damages for breach of contract, and though not helping A to a contract with X, yet enforcing the contract between A and B. (*Jones* v. *North*, L. R. 19 Eq. 426.)

Secondly, cases in which an injunction is sought in support of one or more covenants forming part of a contract. Here the relation established by the contract, may have been existing for some length of time, and the object is to maintain the contract in its integrity. These cases are thus very distinguishable from the first class of cases; for they are not properly cases of specific performance, but they are cases of executed contracts, in which a court may, by injunction, restrain a breach of an obligation arising out of it; but though *pro tanto* this may operate as a performance *in specie* of the contract, they are not cases of specific performance properly so called. (*Wolverhampton Ry. Co.* v. *L. & N. W. Ry. Co.*, L. R. 16 Eq. 439.) In these cases of executed contracts the court will thus restrain the breach of one covenant, though there are other covenants to be performed by the plaintiff, which may be possibly broken hereafter, and which may be such that the court could not enforce them. (*Rigby* v. *G. W. Ry. Co.*, 15 L. J. Ch. 271.) Hence, cases of this kind must also be distinguished from the class of cases which will fall to be considered hereafter under s. 57. Contracts between landlords and tenants, for instance, generally contain many different covenants, some of which may, from time to time, need to be maintained. Illustration (*a*) of s. 54 is an example of such, and is, no doubt, taken from an early case decided in 1727, where the tenant was restrained

Cases of covenants forming part of a contract.

Illustration (*a*) to s. 54.

by an injunction from digging sand, gravel, &c., in violation of a covenant not to do so under a covenant of £100 for every acre of land so broken up, it being shown that the nature of the soil was such that the tenant would be able to raise £1,000 worth of gravel for every £100 of penalty, and, at the end of his term, leave the landlords the bottom of the gravel pits for their estate. (*City of London* v. *Pugh*, 4 Bro. P. C. 395.) So a tenant has been restrained from converting houses to a different use from that prescribed by his lease (*Worden* v. *Ellers*; Eden on Inj. 199); or from breaking up meadow land, contrary to an express convenant, for the purpose of building thereon. (*De Wilton* v. *Saxon*, 6 Ves. 106.) It is the same in the case of a tenancy from year to year as of a lease for a longer term; and such a tenant, under a notice to quit, may be restrained from taking away the crops, manure, &c., contrary to the usual course of husbandry, and the custom of the country, and also from cutting and damaging the hedgerows, and otherwise doing irreparable damage. (*Onslow* v.——, 16 Ves. 173.) So a tenant has been restrained from sowing the land with mustard and other pernicious seed, the same being very injurious to the land and requiring many years to eradicate. (*Pratt* v. *Brett*, 2 Mad. 62.) This case no doubt suggested Illustration (*k*) of this section. In a like case a tenant was restrained from sowing the land with more than two grain crops during four years. (*Fleming* v. *Snook*, 5 Beav. 250.) And in another, a tenant was restrained from removing fixtures, which he had covenanted to keep in repair and deliver up at the end of the term, and though he had substituted a new engine for the old one, he was not allowed to remove it. (*Sunderland* v. *Newton*, 3 Sim. 450.) But as an injunction is always a matter for the discretion of the court, regard will be had to the nature of the tenancy, and where there was a lease for 900 years, and the tenant was proceeding to make alterations in the buildings, the court, though there was a general covenant to maintain and uphold the buildings during the term, regarding the alterations as in fact "meliorating waste," and looking to the term and the absence of real injury to the lessor, refused to interfere, as otherwise the lessee's enjoyment during a long term would have been at the mercy of the lessor. (*Doherty* v. *Allman*, 3 Ap. Cas. 790.) The principle is well settled that in granting or withholding an injunction, the courts exercise

Other cases between landlord and tenant.

Illustration (*k*) to s. 54.

a judicial discretion, and weigh the amount of substantial mischief done or threatened to the plaintiff and compare it with that which the injunction, if granted, would inflict upon the defendant. (Per Wilson, J., in *Shamnugger Jute Factory* v. *Ram Narain*, I. L. R. 14 Cal. at p. 200). For an instance when the court refused to enforce a covenant not to work for a rival tradesman on the ground that the parties were not on equal terms, see *Narsi Tricum* v. *Callianji Harjivan* (I. L. R. 18 Bom. 702).

Covenants restrictive of use in leases.

An injunction is often a very proper and necessary remedy for a landlord against tenants of houses and buildings. Thus where plaintiffs, who were coach-builders, were owners of a private house next to that in which they carried on their business, and defendants applied to them for a lease of the house, asserting that they were not engaged in any trade, and wanted the house as a private dwelling; but soon after they got into possession, proceeded to alter the house so as to fit it for the business of a coach-builder, they were restrained, as well on the ground of misrepresentation, as also because the alteration would wholly change the nature of the subject. (*Barnett* v. *Sadler*, 14 Ves. 526.) Where there was a restrictive covenant against using a house for any business, it was held to be a breach to use it as a charitable home for poor girls. In this case an injunction was issued and the continuance of the breach restrained. (*Rolls* v. *Miller*, 25 Ch. D. 206, S. C. *affirmed in appeal*, 27 Ch. D. 71.) In leases of houses there are often covenants against using the house for particular trades, as for the sale of liquor, and so on; and tenants may sometimes find themselves affected by covenants in their lessor's title-deeds of which, though they have no real knowledge, they may be treated as having constructive notice, and against a breach of which they may be restrained by injunction. (*Fielden* v. *Slater*, L. R. 7 Eq. 523, and cases there cited.)

Implied covenant in such cases.

So in a case of a sale or lease there may, under certain circumstances, be an obligation which ought to be implied for the comfortable or continuous enjoyment of property *in statu quo* at the time of the sale or lease. Thus where A, being the owner of two adjoining houses, demises one to B, and afterwards demises the other to C (which is the very case put in Illustration (*j*)), neither A nor C can make such alterations to the house demised to the latter as will prevent the comfortable enjoyment of the house demised to B; so that if C

threatens or begins to make alterations, which the court is satisfied will prevent the comfortable enjoyment of B's house, an injunction will be granted. (*Palmer* v. *Paul*, 2 L. J. 154, Ch). As to such an implied agreement, there is considerable hazard of the court, by an injunction impeding a man in the exercise of his right; and a temporary injunction ought not to be granted where there is room to doubt, upon the facts, how far such an agreement ought to be implied. But otherwise, the tenant ought to be restrained from a violation of a duty on his part, necessarily or obviously implied from that relation, on the same grounds and under the same circumstances, as the violation of an express covenant would be restrained. (*Kingston* v. *Eve*, 2 V. & B. 349.)

Cases between partners.

Illustration (*l*) to s. 54.

Partnership at will.

Thirdly, cases between partners, where the injunction is in aid of express covenants, or of the duties arising out of the relation of partnership. Illustration (*l*) is of special value as an example of the application of the relief by injunction, because it fully recognises the rule, which the English courts have only adopted after much hesitation, that even in a partnership determinable at will, the court may, in some cases, interfere though a dissolution is not sought. As was said in one case, the court ought to interfere between co-partners, wherever the act complained of is one that tends to the destruction of the partnership-property, notwithstanding a dissolution of the partnership may not be sought (*Miles* v. *Thomas*, 9 Sim. 609), for otherwise it is obvious that a person fraudulently inclined might, of his mere will and pleasure, compel his co-partner to submit to the alternative of dissolving a partnership, or ruin him by continued violation of the partnership contract. (*Fairthorne* v. *Weston*, 3 Hare, 392.) In the case of a partnership determinable at will, there is the difficulty that if the court interferes, the defendant might immediately dissolve the partnership; yet the injunction will not then necessarily be futile, as for instance in such a case as Illustration (*l*); and so long as the injunction continues, the defendant is powerless for evil, and his notice to dissolve does not affect the injunction. (Lind. on Part. 1004.) So, where some of the members seek to embark the others in a business not originally part of the partnership concern, and these are not shown to have either expressly or tacitly acquiesced in the proposed extension, the others may be restrained from carrying it out. So, where a member of a firm has neglected to enter the receipt of partnership

money in the books, and does not leave them open for inspection, he may be restrained without dissolving the partnership. And generally, an attempt to exclude one partner from his share in the management, is a ground for an injunction. Thus, one director, wrongly prevented from acting, may have an injunction against his co-directors to restrain them from excluding him. As a director, he has a right to attend and take part in the management of affairs, and to receive any fees for such attendance. (*Pulbrook* v. *Richmond C. M. Co.*, 9 Ch. D. 610.)

Nature of the injury to justify an injunction.

As a general rule, a mere fugitive temporary breach, involving no serious evils or mischiefs, and not endangering the future success and operations of the partnership, will not constitute any case for relief by injunction. Thus a court will not interfere in cases of frivolous vexation, or for mere differences of temper, casual disputes, or other minor grievances between the parties, which may be somewhat inconvenient and annoying, but do not essentially obstruct or destroy the ordinary rights, interests, and operations of the partnership. (*Goodman* v. *Whitcomb*, 1 J. & W. 592; Story on Part. 225, 287.)

In all cases where a contributory petitions for the winding-up of a company the court keeps two matters in view. The first is its unwillingness to interfere with the shareholders in the management of their own affairs, and this includes the questions whether the business shall be carried on or not, and whether if the company is wound up at all, the winding-up shall be voluntary or by the court. The second matter kept in view, and equally so with its unwillingness to interfere, is that the court has jurisdiction in an extreme case to wind up a company at the instance of a contributory, notwithstanding that he is not supported by a majority of the shareholders. (*In re Bristol Joint Stock Bank*, 44 Ch. D. 703.) In this case a banking company had a capital of £24,000 in 2,400 shares of £10 each, of which £5 was paid and the balance was not to be called up except in the event of, and for the purposes of, the company being wound up. The company had made no profit though it had been in existence for six years, and though there was originally a large staff employed in extensive premises, it was at the time of suit being carried on by one clerk in small premises and all the paid-up capital but £337 had been expended. The petition was supported by a considerable number but not by a majority of

the shareholders whilst no creditor appeared. The court made a winding-up order on the ground that it was impossible that the business could be carried on with any reasonable hope of success. In a somewhat similar case where a company was carrying on a business not authorized by the memorandum of association it was considered just and equitable that it shall be wound up. (*In re Crown Bank*, 44 Ch. D. 634.)

Another general rule is that with regard to matters that are within the proper scope of the partnership business, and therefore to be decided upon and regulated by internal management, it is in the first instance for the partners as a body to discuss the matter in difference, and what the majority (whether in a private firm or a public company) determine, the minority must accept; and in such matters the court does not interfere except to give effect to the will of the majority against a factious minority. On the other hand, as to matters beyond the scope of the partnership business, and which would, therefore, be illegal acts though sanctioned by a majority of the partners, the court will interfere to restrain them, at the instance of even a single dissenting partner or shareholder. The principle is that the court will not undertake the internal management of a going concern; the domestic *forum* provided by the partnership agreement must be resorted to; and interference is limited as to legal matters to support the majority, but as to illegal matters it is available by any one partner. (*Carlen* v *Drury*, 1 V. & B. 154; *Foss* v. *Harbottle*, 2 Hare, 461; *Mozley* v *Alston*, 1 Ph. 790; *Lord* v. *Copper M. Co.*, 2 Ph. 740; *Beman* v *Rufford*, 1 Sim. N. S. 550; 2 Lind. on Part., B. iii, c. 10, s. 3; Ind Con. Act, 253 (5.)

Where the matter is one to be decided by the majority.

Generally, an injunction will be granted against a partner who grossly or wantonly obstructs, injures, or prevents the carrying on of the partnership business; or who designedly misapplies the property of the partnership to purposes not warranted by the articles, or by the objects of the business. (Story on Part. 227.) Thus, where a partner had abstracted partnership books contrary to an express covenant, he was restrained (*Taylor* v. *Davis*, 3 Beav. 388, *e.*) So, a partner has been restrained from accepting or negotiating bills of exchange otherwise than for the purposes of the partnership; from doing an intentional serious injury to the partnership-property; from removing the partnership books

Cases for the grant of an injunction.

from the place of business; from receiving as his own, goods which there were strong grounds for believing had been bought for the firm. (*Williams* v. *Bingley*, 2 Vern. 278, *n*; *Marshall* v. *Watson*, 25 Beav. 501; *Greatrex* v. *Greatrex*, 1 D. & S. 692; *Gardner* v. *M'Cutcheon*, 4 Beav. 534.) So, where there was a partnership for a long term, and one partner wholly excluded the other, an injunction was granted restraining the defendant from applying any of the money and effects of the firm, otherwise than in the ordinary course of business, and from obstructing or interfering with the plaintiff in the exercise and enjoyment of his rights under the articles. (*Hall* v. *Hall*, 12 Beav. 414; 20 Beav. 139; and 3 M. & G. 79.) In a like case where the business was carried on at several places, and the lease of one place had expired, and one partner, against the will of the other, had taken a renewal of the lease, he was restrained from employing the credit or assets of the firm in carrying on the business at such place, the partnership being otherwise left to proceed. (*Clements* v. *Norris*, 8 Ch. D. 134.) In another case there were four partners, and it was an express covenant that the names of all four should be used in signing the firm name, and two were using only their own names with the addition of "and Co.," and it was intimated, though an injunction was refused in the particular facts of the case, that such a breach, if it were a studied and prolonged inattention to the contract, and likely to result in any damage, might be restrained. (*Marshall* v. *Colman*, 2 J. & W. 266.) Again, where there was a covenant that in case any partner wished to dispose of his interest in the firm, he must first offer it to the other partners, an exact compliance therewith was enforced by an injunction. (*Homfray* v. *Fothergill*, L. R. 1 Eq. 567.) In one case the injunction went so far as to restrain one partner from interfering in any way in the management of the business, because his misconduct of his part of a contract, in which the firm were engaged, had led to serious losses, and the contract had been several times suspended, and was in danger of being rescinded. (*Anderson* v. *Wallace*, 2 Moll. 540.) Parties who are bound to each other as partners, to promote an undertaking for the common benefit, will be restrained, should any of them engage in another concern, which *necessarily* gives them a direct interest adverse to that undertaking; but a mere temptation to be dishonest and betray their duty is not enough; there must be some real conflict of interests, and to that extent interference will be limited. (*Glassington* v. *Thwaites*, 1 S. & S. 124.)

Sometimes an injunction operates to prevent a dissolution. Thus, where there was a partnership for a term not expired, and one partner insisted on a dissolution, and joined another firm which interfered with the business of the old firm, there was an injunction to restrain him from carrying on business with his new partners, or otherwise than with his old partners, till the expiration of the term; and also restraining the new partners from carrying on business with him in the name of the other firm, and prohibiting the publication of any notice of the dissolution of the old firm before the expiration of the term fixed upon. (*England* v. *Curling*, 8 Beav. 192.) In another case, where a partner had been temporarily insane, but had recovered, he obtained an injunction against the other partners, restraining them from preventing him from taking his share in the transaction of the business of the firm. (*Anon.*, 2 K. & J. 441.)

Dissolution prevented by injunction.

In a partnership for no fixed time, it has been suggested that a sudden and unseasonable dissolution, without the consent of all, might be restrained. This was no doubt the rule of the civil law, and is adopted by the French and other codes; but it is not the rule in England or in India. There, in the absence of express contract, the partnership may be determined when any partner thinks proper; but not in this sense, that there is then an end of the whole concern; for all the subsisting engagements must be wound up; and for that purpose the partners remain with a joint interest; but they cannot enter into any other engagements. Further, if such sudden dissolution, by one partner, was with an unfair or fraudulent purpose, as to secure for himself a benefit about to accrue to the partnership, as the renewal of a lease or so on, this breach of the good faith required among partners would be defeated (though the dissolution cannot be prevented) by the partner being treated as a trustee for all the others of the benefit so acquired. There is thus, as it seems, little or no substantial difference between the rule of our law and of the Roman or French laws. (1 Story's Eq. 688; French Code Civil, 1869-70; *Peacock* v. *Peacock*, 16 Ves. 56; Ind. Con. Act, s. 253 (8); Bell's Com. I. 7, 12.)

Dissolution where there is no fixed term.

Further, on a dissolution, in the course of the winding-up, an injunction may be needed to protect the joint assets. Thus one partner will be restrained from carrying on the concern for any other purpose than winding-up; from damaging the value of the goodwill,

Injunctions on dissolution.

if it ought to be sold for the benefit of all; from improperly ejecting the representatives of his deceased co-partner, or from misapplying the assets to his own use and their detriment; and they, on the other hand, will be restrained from using property really belonging to the partnership, though standing in the name of the deceased partner. (*De Tastet* v. *Bordenave*, Jac. 516; *Turner* v. *Major*, 3 Giff. 442; *Elliott* v. *Brown*, 3 Swan. 489, *n.*; *Hartz* v. *Schrader*, 8 Ves. 317; *Alder* v. *Fouracre*, 3 Swan. 489, *n.*; Lind. on P. 1005.)

Cases arising out of some fiduciary relation.

Lastly, as to cases where the injunction is to enforce an obligation arising out of some fiduciary relation. Illustrations (*b*) to (*i*) to s. 54 are all examples of this class of cases, and in each the relation has been constituted by some contract, though in some instances the legal consideration supporting the obligation is no greater or more definite than that which justifies the enforcement of the duties of a gratuitous bailee, when once he has entered upon the position.

Illustration (*b*) to s. 54.

On Illustration (*b*) the rule has thus been stated: If one trustee be cognisant of a breach of trust committed by another, and either industriously conceals it, or does not take active measures for the protection of the beneficiary's interest, he will himself become responsible for the mischievous consequences of the act. A trustee is called upon, if a breach of trust be *threatened*, to prevent it by obtaining an injunction, and, if a breach of trust has been *already committed*, to sue for the restoration of the trust fund, or take other active measures for that end. (*In re Chertsey Market*, 6 Price, 279; Lewin on Trusts, c. xii.) Further, as the beneficiary may compel the trustee to the observance of his duty, so, on the other hand, if he have reason to suppose, and can show that the trustee is about to proceed to do an act not authorised by the true scope of the trust, he may obtain an injunction to restrain the trustee from such a wanton exercise of his legal power. (*Balls* v. *Strutt*, 1 Hare, 146; Lewin on Trusts, c. xxv.)

Illustrations (*c*) and (*d*) to s. 54.

Illustrations (*c*) and (*d*) are both examples of a large class of cases where directors of a company (who are really trustees for the shareholders) threaten acts in violation of their duty. In both the acts are illegal, and so outside those acts which, being matters of internal arrangement, are to be decided by the majority, and consequently any one shareholder may sue to restrain such acts.

Principle involved in Illustration (*d*).

As to cases of this kind, the acts to be restrained may be classed as (1) acts illegal, considered as breaches of contract with the public; (2) acts which are breaches of contract, express or implied, with the shareholders; and (3) acts illegal, as being *ultra vires* of the company. (*Browne* v. *Monmouth R. & C. Co.*, 13 Beav. 32.) Illustration (*d*) is taken from the case of *Natusch* v. *Irving* (2 Coop. C. C. 358); there an offer was made to the plaintiff to indemnify him or to pay him what was due to him, and let him retire; but it was said, "the right of a partner is to hold to the specified purposes his partners whilst the partnership continues, and not to rest upon indemnities with respect to what he has not contracted to engage in. A dissatisfied partner may sell his shares for double what he originally gave for them; but he cannot be compelled to part with them for that reason; it may be his principal reason for keeping them, having the partnership concern carried on according to the contract. The original contract, and the loss which his partners would suffer by a dissolution, is his security that it shall be so carried on for him and them beneficially, and with augmented improvement in the value of his shares and their shares." Or, as was laid down in another case, each partner is entitled to say to the others, "I became a partner in a concern formed for a definite purpose, and upon terms which were agreed upon by all of us; and you have no right, without my consent, to engage me in any other concern, or to hold me to any other terms, or to get rid of me if I decline to assent to a variation in the agreement by which you are bound to me and I to you." Nor is it at all material that the new business is extremely profitable. (*Attorney-General* v. *G. N. Ry. Co.*, 1 D. & S. 154.) Hence, a company embodied for a specific purpose cannot delegate its powers, or transfer its property and business, unless such power is conferred by its original constitution; and two companies cannot amalgamate with each other, unless such a transaction is authorized by the constitutions of both companies, or unless all the shareholders in both consent. Even in the case of an unanimous agreement to change the business of the concern, there is a material difference between a private partnership and a company. In the former, the union of the partners rests solely upon mutual agreement, and it is open to them all together, at any time, to vary its terms, or change its purpose; but a company created by special Act, charter or registration is constituted by a law defining

its objects and limiting its powers, and such law cannot be abrogated even by an unanimous agreement. (Lindley, B. iii, c. 2, s. 3.) A striking example of this is a case in which it was held to be incompetent for all the members of a chartered company to divide all its property among themselves to the detriment of the company, by not paying for the nominal shares with which they were debited in the books, and then selling those shares to others, who thus found little or no capital in existence. (*Society of P. Knowledge* v. *Abbott*, 2 Beav. 559.)

Principle of Illustration (*c*).

Illustration (*c*) is perhaps a simpler kind of case, probably suggested by *McDougal* v. *Jersey Hotel Co.* (2 H. & M. 528), but rests on the same principle, that the act contemplated is an employment of the funds of the company contrary to the intended purpose. A private partnership might indeed, by the consent of all, do so; but in a public company to pay dividends out of capital or borrowed money would clearly be within the definition of an act *ultra vires*. (On these cases see *ante*, p. 152.) In England there is this distinction, that the payment of dividends once declared, though out of an improper fund, will not be restrained, since the company becomes liable to an action of debt at law by every person entitled to dividends actually declared. (*Carlisle* v. *S. E. Ry. Co.*, 1 M. & G. 689.) But I would submit that in our courts in India there need be no such restriction; and that if, looking to the fund out of which the dividends are to be paid, the declaration ought to be restrained, the payment of them ought equally to be restrained, though declared. The terms of Illustration (*c*) would support this view, though perhaps the distinction between declaring and paying dividends was not present to the mind of the Legislature in framing this Illustration.

It is quite regular for a company to defend itself, if it is attacked in its commercial character; as to spend its money in opposing a bill, which it may think will, if passed into an Act, be injurious to it. So also a company may sue or defend its own directors or agents, in respect to acts done by them which relate to the express purposes of the company. But it cannot spend its money in prosecuting a suit not instituted by itself, though it may be brought by others for the benefit of the company, nor in any litigation or matter not strictly within the objects for which it was created, as in prosecuting an action against a former secretary for libel upon the directors. The principle of *Natusch*

v. *Irving* that expenditure must be limited to the proper objects of the company, is one applicable under any system of law. (*Pickering* v. *Stephenson*, L. R. 14 Eq. 322; *Kernaghan* v. *Williams*, L. R. 6 Eq. 228.)

Other similar acts *ultra vires*.

The instances in which acts of this kind have been restrained in England, are very various, but a very brief summary must suffice. Thus, an injunction has been granted to restrain the registry of an improper transfer of shares; calls for illegal purposes; the illegal issue or forfeiture of shares; the making of loans to directors, and so on; besides the kinds of acts already noticed. (Lind. on P., B. iii, c. 10, 5, 3.) In *Shamnugger Jute Factory Co.* v. *Ram Narain Chatterjee and others* (I. L. R. 14 Cal. 189) the plaintiffs were co-owners of certain land with the defendants, and upon the latter commencing to erect a rival factory on the joint land the company sued for an injunction restraining them from building the factory on the lands which the plaintiff company alleged to be agricultural and horticultural. The objection was raised that the taking of the *patni* leases whereby the plaintiff company became co-owners with the defendants was *ultra vires*. It having been found that the lands were agricultural, the court laid it down that the powers of a company depend on its Memorandum of Association or other instrument of incorporation, and it can do nothing which that document does not warrant expressly or impliedly. A company, therefore, formed to carry on one trade cannot engage in another. But, on the other hand, this doctrine must be reasonably understood and applied; and a company in carrying on the trade for which it is constituted, and in "whatever may be fairly regarded as incidental to or consequential upon that trade," is free to enter into any transaction not expressly prohibited.

Illustration (*e*) to s. 54.

With regard to Illustration (*e*) it is to be noted that an executor, who has once accepted that position, is a trustee on behalf of all interested under the will, for the due administration of the assets. It is true that there are some differences between the powers and liabilities of co-executors, and of co-trustees under an ordinary trust-deed, as, for instance, in respect to their power severally to get in or deal with the assets, their respective liability for joining in receipts, and such matters of detail arising out of the difference in the constitution of the office of executor; but speaking generally, equity courts deal with them as with ordinary trustees. In the particular instance

of insolvency specified in Illustration (*e*), interference was forced upon the courts of equity in England by the conflict of jurisdiction between the other courts. The ordinary form of relief is to enjoin the executor and appoint a receiver. But, as the Illustration shows, the mere fact that the executor is in mean circumstances will not be enough; there must be danger therefrom to the property of the deceased. Much more, if a person *known* at the time by the testator to be insolvent, be appointed an executor by him, he ought not, on the ground of insolvency alone, to be interfered with; though, at the same time, the fact that the prior appointment of him was not altered afterwards on his insolvency, does not show that the testator had a deliberate intention to entrust the management of his estate to an insolvent executor. (Williams on Executors, Pt. 1, B. iii, ch. 1.) As to the liability of trustees for negligence in enforcing the payment of the assets forming the trust fund due and owing by others, see *In re Brogden* (38 Ch. D. 546.) Where a trustee paid a premium on a policy to preserve it, he was held, in the circumstances, not entitled to recover what he had so paid. Such a right to be indemnified is strictly limited to the preservation of the trust fund itself. (*Winchelsea's Trusts*, 39 Ch. D. 168.)

Illustration (*f*) to s. 54.

Illustration (*f*) is an example of the exception introduced into clause (*i*) of s. 56, and is a modification of the general rule implied by clause (*c*) of s. 54; the ground of this special interference being that the beneficiary being, to the limit of his interest, the true owner of the property, has a right to restrain the trustee from dealing with it, on his behalf, otherwise than a prudent owner would deal with it. This doctrine was not established without a conflict of decisions. In one case it had been held that a beneficiary could not restrain an *improvident* sale by the trustee, because the beneficiary might proceed against the trustee for the consequential damage to the estate, and so the injury was not irreparable. (*Pechel* v. *Fowler*, 2 Anstr. 549.) But, in another case, where there was a trustee with a power of sale on behalf of two parties with conflicting interests, and the imprudence consisted in that the sale was about to be made without proper advertisements and notices, it was held that the sale might be restrained; as the trustee was bound to attend equally to the interests of both parties, and that each of them might take the best means to procure an advantageous sale. (*Anon.*, 6 Mad. 10.)

Other cases against trustees.

There are, of course, a vast variety of other cases in which trustees may, by means of an injunction, be restrained from violating their duties, or exceeding their powers as against those affected thereby. Thus, the right of a member of a club is based upon his right to use and enjoy the property of the club; and hence, in cases of improper exclusion of a member, there may be an injunction against the committee; as where he has been expelled without an inquiry conducted in accordance with the rules of ordinary and common justice. (*Fisher* v. *Keane*, 11 Ch. D. 353; *Labouchere* v. *Wharncliffe*, 13 Ch. D. 346; *Dawkins* v. *Antrobus*, 17 Ch. D. 615; *Aslatt* v. *Corporation of Southampton*, 16 Ch. D. 143.) In the case of an ordinarily constituted club, in which members have rights of property, any member whose rights have been interfered with by the committee may ask the court to consider whether the rules of the club have been adhered to, or whether any act contrary to natural justice has been done; and whether the committee's decision has been come to *bonâ fide*. But where the members have no right of property, one who has been expelled by the committee cannot obtain relief by injunction though the proceedings were irregular. He must seek his remedy in damages. (*Baird* v. *Wells*, 44 Ch. D. 661.) But the court does not interfere with the trustees or other managers of any institution (such as a club, a public school, or a charitable or religious institution) in the exercise of their discretion as to removing members or subordinates, as masters or others, who are subject to removal by them for cause shown. The principle is that if their powers are exercised *bonâ fide* and not corruptly, nor so oppressively or wrongfully as to be in violation of all rules of ordinary justice, it is not for the court to discuss the reasonableness of the grounds on which they have proceeded, nor are they required to act only on strict legal rules as to evidence. Corruption or misconduct not being shown, and *bonâ fides* being present, no court can question their discretion in using their lawful powers. (*Hayman* v. *Rugby School*, L. R. 18 Eq. 28.) But where their proceedings were against common justice, trustees were restrained from acting on a dismissal they had declared. (*Dean* v. *Bennett*, L. R. 6 Ch. 489.) On the other hand, where a dismissal has been duly declared in the exercise of their discretion, the subordinate, as a minister or head master, may be restrained by injunction from attempting to exercise his office. (*Cooper* v. *Gordon*, L. R. 8 Eq. 249.) In one curious case an injunction was sought to restrain a university

from granting, on a particular occasion, more than one gold medal, but it was refused, as being purely a matter of internal management, as to which the Visitor was the only court of appeal. (*Thomson* v. *University of London*, 10 Jur. N. S. 669.)

In *Olive* v. *Westerman* (34 Ch. D. 70) the trustees were held liable for investing on insufficient security. Similarly in *Knox* v. *Mackinnon* (13 Ap. Cas. 753), although there was an immunity clause. For other cases on the liability of trustees for improvident investment or for negligence causing loss to the *cestuis que trustent*, see *Fry* v. *Tapson* (28 Ch. D. 268); *Smethurst* v. *Hastings* (30 Ch. D. 490); *In re Whiteley* (33 Ch. D. 347); *Learoyd* v. *Whiteley* (12 Ap. Cas. 727).

Illustration (*g*) to s. 54.

Illustration (*g*) is the complement to s. 24, clause (*d*), and s. 25, clause (*e*), and Illustration (*d*). These show that neither a purchaser with notice of a prior voluntary settlement, nor a vendor who has made a prior voluntary settlement can enforce specific performance of the contract; that is, in each case the other party to the subsequent contract may avail himself of the fact of the prior voluntary settlement as a defence to a suit for specific performance of the contract. Here, in Illustration (*g*), we have the case put of one interested under a prior voluntary settlement, actively interposing as against the settlor, to restrain a subsequent contract of sale; though we should also note that the injunction does not operate here indirectly as a specific performance of the settlement, but only to prevent an extraneous act in violation of it. As against the intending purchaser, the proper course is to give him notice of the prior settlement. In discussing settlements generally, we have considered (*ante*, p. 59) what voluntary settlements are alone capable of being specifically enforced against the settlor or those claiming under him. It is only a settlement of which there might be specific performance under s. 12, clause (*a*), that is entitled to the indirect protection of an injunction as suggested by Illustration (*g*).

What is a valid voluntary settlement.

As the subject is a large one, it may be convenient here to give the following summary of what is a valid voluntary settlement. As a general rule, where there is a plain intention to create a definite trust of property, real or personal, legal or equitable, and everything is done that can be required to complete the transaction on the part of the donor, the trust although voluntary, is constituted and is binding

upon the donor and all claiming under him. The simplest case is where a person actually conveys, assigns, or transfers property of which he is the owner, and declares the trust upon which the assignee is to hold the property; there an irrevocable trust is created, even without any communication to the donee.

As regards personal estate, where writing is not necessary, declarations made previously to the act of transfer, or contemporaneously with it, and relating to it, are of the greatest value; and a trust, once constituted by such declarations, cannot be changed by the party, nor will it be affected by any declarations at subsequent periods. Indeed a trust which is once effectually created, whether by a formal instrument, or by parol, where a parol declaration alone is sufficient, cannot be revoked.

It is not necessary that there should be any transfer of property accompanying the declaration of trust, whether the fund be in the possession of the donor or of another; the property may still remain as it was, and the donor may constitute himself, or the possessor, the trustee of the fund; and in such case it is not necessary that the donor should expressly declare himself to be trustee; if he do any acts in relation to property to which he is legally entitled, though without reference to the creation of a trust, from which it clearly appears that he considered that the property, though legally vested in him, had ceased to be his, and had become the property of another, those acts may amount to a sufficient declaration that the donor holds the property in trust so as to be binding upon him, equally as where the donor makes an express declaration of trust. (2 Spence's Eq. 52-53.)

Illustrations (*h*) and (*i*) to s. 54.

Illustrations (*h*) and (*i*) are precisely similar cases; in the one a legal, and in the other a medical, adviser threatens to commit a breach of the obligation to observe the strictest confidence in respect to all matters coming to their knowledge by reason of their employment; the contract of service between the parties having constituted a fiduciary relation of the one to the other, which (as we have seen in respect to other matters) forbids a legal or medical adviser, just as much as any ordinary trustee, to take advantage of his position, whether to injure the other party, or to secure for himself any benefit or profit other than what may have been distinctly agreed upon. There have been cases very similar to that put in Illustration (*h*). (See *Davies* v. *Clough*, 8 Sim. 262; *Lewis* v. *Smith*, 1 M. & G. 417; *Evitt* v. *Price*, 1 Sim. 483.)

In *Macleod* v. *Jones* (24 Ch. D. 289), a solicitor who had taken a mortgage from his client, a lady, was restrained by injunction from exercising a power of sale in the deeds. Cases of this kind seem to lie very much on the border-line between cases of contract and of tort; and though, in the examples given in these Illustrations, the injunction may be rightly said to be for the prevention of a breach of contract, it must be remembered that there may also be an action for damages consequent upon the divulging of a confidential secret. In the analogous cases of injunction to prevent the revealing of trade secrets (see Illustration (*z*) to this section), there is present the further ingredient that the act threatened would cause damage to, or constitute an invasion of, the right of property; and these are more distinctly cases of tort.

Symonds v. *Hallet* (24 Ch. D. 346) was a peculiar case. There, a husband was residing with his wife in a house which was settled on her for life, and a suit was pending by the wife for judicial separation; the two had ceased to cohabit, but the husband insisted on going to the house whenever he liked, not for the purpose of cohabiting with the wife but really to annoy her, and, as was suggested, to take occasion for removing various articles from the house. The court gave the wife an *interim* injunction against the husband to restrain him from exercising his right of entering the house.

Injunctions in torts.

III. Injunctions, both temporary and perpetual, in cases of tort.

Torts may be as varied in their form as the ingenuity of one man is capable of contriving methods for invading the property or violating the rights of another. It is not to all torts that the relief by injunction is appropriate; but in some cases of threatened invasion of the rights in property (real or personal) it may by itself constitute a complete remedy; or where there has been an actual invasion, it may be a proper or necessary addition to a decree for damages. The grounds for granting a temporary or a perpetual injunction in any case of tort are the same, excepting that to justify an injunction before judgment there must be present the ingredient of the danger of irreparable loss unless immediate relief be given.

Arrangement of the subject.

It will be convenient to take the classes of cases pretty much in the order of the Illustrations, which comprise, *firstly* injuries to real property; and *secondly*, injuries to personal property; under the first head come cases of waste, then cases of trespass, and, lastly, cases of nuisances;

and under the second head are injuries to patent rights, to copyright in books, to property in trade-marks, to property in unpublished letters, or in trade secrets, and so on.

Cases of waste.

The cases of waste (which must be distinguished from cases of waste *pendente lite*) will comprise cases in which one person is in possession of any property, but has only a qualified and not an absolute interest therein, and so deals or attempts to deal therewith, as to damage or hazard the same, to the injury of another person, who also has an interest in the same subject-matter, though such interest may be subject or subsequent to, or only enjoyed conjointly with, the qualified interest of the person in possession. This class, therefore, takes in cases between tenant for life and remainderman, cases between mortgagor and mortgagee, lessor and lessee (omitting such cases as are merely breaches of contract between these parties), and cases between persons in undivided possession, such as co-parceners, joint tenants, and tenants in common.

Illustration (*m*) to s. 54.

Illustration (*m*) is an example of the numerous and important class of cases in which a tenant for life may be restrained from waste at the suit of the remainderman. The principle of all such cases is, that where a person has a qualified or temporary interest in property, and another has an interest in the same subject-matter, on the determination of, or subject to, the prior interest of the person in possession, such person in possession is not justified in so dealing with the property as to increase the proper burden or extent of his qualified interest, and so to render the interest of the remainderman less valuable when it falls into possession than it otherwise would have been. Hence it is clear that the right of such remainderman to call for the aid of a court, involves the consideration and definition of the interest (and of the powers consequent thereto) vested in the person in possession. It is not possible here to consider what qualified estates for life are known to the Hindu or other laws in force in India; indeed, in such a common instance as that of the estate of a Hindu widow, a precise definition of her powers, which shall be applicable everywhere, is not possible.

Cases between tenant for life and remainderman.

Different kinds of waste.

In English cases, waste is very usefully distinguished into three kinds: (1) *Legal* waste, which perhaps may be described as such waste by cutting timber, pulling down and altering buildings, and so on, as the owner of an

estate in fee simple, having due regard to his present interest, and to the permanent advantage of his estate, might properly commit in a due course of management. (*Per* Sir J. Romilly, M. R., 22 Beav. 389.) (2) *Equitable* waste, or such as cannot be imputed to any such fair acts of ownership, but is destructive of the property itself, and has been called extravagant and humorsome waste (*Abrahal* v. *Bubb*, 2 Freem. 54); or, as was said in another case, equitable waste is that which a prudent man would not do in the management of his own property. (*Turner* v. *Wright*, 6 Jur. N. S. 810.) It is waste of this kind that seems to be pointed to in Illustration (*m*). (3) *Permissive* waste, that is, which arises from acts of omission, as neglecting to repair, and so leaving the property to go to ruin; and which is thus distinguishable from the two other kinds of waste, which are active, voluntary, or wilful. In *Courtier* v. *Courtier* (34 Ch. D. 137) the question arose between the remainderman and the tenant for life as to whether the latter was bound to keep leasehold premises in repair.

Powers of tenant for life as to legal waste.

Generally, a tenant for life has the bare enjoyment and use of the property, and may not commit even legal waste. Ordinarily, he is entitled only to use the thing for his own benefit or convenience, according to his natural or agreed uses, and to enjoy the produce—whether natural, as the fruit, or legal, as the rents—but so that the substance of the thing is saved, its nature and form not being changed, and the permanent interests of the proprietor not being invaded. (*Aston* v. *Aston*, 1 Ves. 265; see Bowyer's Civil Law, 104, 5; Just. Instit. B. 2, Tit. 4, *de usufructu*.) Hence, such tenant for life may not cut timber, for the timber growing on the estate is part of the inheritance, and he has no present right to, or interest in, the timber other than as it is, including what is needed for fuel or ordinary repairs, but not what is required for new buildings. (See the leading case of *Garth* v. *Cotton*, 1 L. C. in Eq. 751.) So also he cannot dig for gravel, lime, clay, brick-earth, stone, or the like, except for the repairing of the buildings, or the manuring of the land. It is the same of mines, and a mere tenant for life may not open new mines or quarries, or work for commercial purposes those before used only for some restricted purposes; but he may continue to work such as were lawfully opened by one who preceded him in the possession of the property; and he may do such acts as are necessary for the working of the old mines,

as opening new shafts or pits for following the old vein, or supplying air to the work-people. (*Clavering* v. *Clavering*, 2 P. Wms. 388; *Clegg* v. *Rowland*, L. R. 2 Eq. 160; *Elias* v. *Snowdon Co.*, 4 Ap. Cas. 454; *Elias* v. *Griffith*, 8 Ch. D. 532.) If such waste occurs, as where timber is severed by accident, or by the act of some stranger, or where, for the benefit of the property, it has been necessary to cut it, the property therein belongs to the first owner of the inheritance, though the interest of the proceeds may be paid to the tenant for life. (*Tooker* v. *Annesley*, 5 Sim. 235; *Waldo* v. *Waldo*, 12 Sim. 107; *Honywood* v. *Honywood*, L. R. 18 Eq. 306.)

As to waste by a Hindu widow see Mayne, H. L. and U. § 565. No very definite opinion is given, but what is said amounts to saying that there must be waste of a gross kind, *i.e.*, in effect equitable. It seems that in a very gross case a receiver might be appointed, not as a forfeiture of the widow's estate, but as a protection to the estate as a whole, and a case in 14 M. I. A. 198 is referred to and also some old Sudder Adalut cases in Bengal.

But a tenant for life is not always thus restricted, but he may, either expressly or by operation of law, be entitled to legal waste, that is, to the benefit of all fair acts of ownership. Such may be the case with a Hindu widow in some parts of India, and such would be the case with a Hindu holding ancestral or undivided property, which he is not entitled to alienate to the damage of his expectant heirs or coparceners, but which he may otherwise fairly enjoy as a prudent owner might. But such an one must use without abusing the property, and will be liable for, and may be restrained by injunction from, committing acts of extravagant or destructive waste, as in the case supposed in Illustration (*m*). (*Baker* v. *Sebright*, 13 Ch. D. 179.)

Equitable waste by tenant for life.

Extravagant or destructive waste got the name of *equitable* waste in English law, because, supposing a tenant for life or other qualified owner was entitled to do all ordinary acts of ownership, there was at law no remedy to prevent his abuse of this right, and courts of equity had to interfere to prevent the unconscientious abuse of a legal right; and our courts are clearly bound to interfere in the same way. (*Baker* v. *Sebright*, supra.) Sometimes it has been called malicious waste, but the presence of a bad motive is not an essential ingredient; for the court may interfere where a man unconscientiously exercises a legal right to the prejudice of another; and an act may, in some sense,

be regarded as unconscientious, if it be contrary to the dictates of prudence and reason, although the actor, from his peculiar frame of mind, does the act without any malicious motive. (*Turner* v. *Wright*, 4 Beav. 40; 6 Jur. N. S. 809.) Instances of such waste are stripping an estate of all its timber, whether fit to be felled, or originally planted for the purpose of ornament and shade only; or pulling down the mansion-house or other principal buildings.

Examples of such waste.

A leading case on this subject is *Vane* v. *Barnard* (2 Vern. 738), where Lord Barnard, out of enmity to his son, who was entitled in remainder, got together workmen, and began to strip his castle of doors, windows, lead, &c., to the value of £3,000; but he was restrained from so doing, and decreed to restore the building. The limits of what is extravagant or equitable waste that ought to be restrained, though the tenant for life may be entitled to commit ordinary or legal waste, was well expressed in another case, in which the tenant for life, though without impeachment for waste, was shown to have stript the estate, as to have left no timber fit even for the repairs of the farm buildings, and she was therefore restrained from cutting any more timber without the leave of the court. It was there said: "If tenant for life without impeachment for waste pulled down farm-houses, in general I would no more scruple in restraining him, than I should from pulling down the mansion-house (unless where he pulled down two to make into one in order to bear the burthen but of one), it tending equally to the destruction of the thing settled. If therefore he should grub up a wood settled so as to destroy the wood absolutely, I should restrain him. Since Lord Barnard's time I have gone further and restrained the taking down trees for ornament and shelter to the house. If a new case happens, not the same *in specie*, but essentially within the cases, the same rule ought to govern. It is therefore inferred that the court ought, in general, to grant an injunction against tenant for life without impeachment for waste, for cutting down any timber not full grown or proper for building, or any thing the doing of which might be a spoil or prejudice to the estate for the future. Something of that kind might be wished for, but it is in general difficult to attain, and inconvenient to do it. . . . It would be very dangerous for the court to use such latitude as to extend this interference to the taking away the profits of the estate by the tenant for life (though to the prejudice of the remainderman) which his estate

for life without impeachment for waste, gives him liberty to do." (*Aston* v. *Aston*, 1 Ves. S. 265.) The courts cannot determine what is ornamental timber, it being merely a matter of taste; they therefore say that what was planted for ornament, must be considered as ornamental; but what was not so planted, is not to be so treated, though in fact ornamental. But ornamental trees which injure the growth of others, or are so near the house as to be prejudicial to health, may be cut. (*Downshire* v. *Sandys*, 6 Ves. 108; *Mahon* v. *Stanhope*, 3 Mad. 323; *Coffin* v. *Coffin*, Jac. 71; *Lushington* v. *Boldero*, 6 Mad. 149.) Where such ornamental timber has been improperly felled, the damages to which the reversioner is entitled, can only be measured by the damage done to the inheritance. (*Bubb* v. *Yelverton*, L. R. 10 Eq. 465.)

Ornamental timber, what.

From the leading case of *Garth* v. *Cotton* (1 L. C. in Eq. 751) we may learn the principle that a tenant for life (who might be restrained from committing legal or equitable waste) cannot, by colluding with the possible and then vested remainderman—owner of the first estate of inheritance—commit such waste to the detriment of another tenant for life in remainder, or of an intermediate remainderman, whose estate at the time of the waste was only contingent, and had not arisen; but such tenant for life in remainder, or the trustees on behalf of contingent remainders, may sue to prevent such waste being committed, or such contingent remainderman, when he comes into being, may compel the other to refund his share of the spoil. (*Birch-Wolfe* v. *Birch*, L. R. 9 Eq. 683.) In one case an injunction was granted on behalf of an infant, *en ventre sa mère*, to restrain such waste (*Lutterel's case*, P. in Ch. 50; *Robinson* v. *Litton*, 3 Atk. 211); and the case of a Hindu widow who is left pregnant, and who, succeeding in the *interim* to her husband's estate, commits waste in collusion with the heir-expectant upon her own death without issue, would be a very similar case.

Where tenant for life and remainderman collude.

As to what is to be done with the proceeds of equitable waste when committed, the rule is not very clear. The tenant for life ought not, it is said, to derive an advantage from his own wrong; but it does not therefore follow that the first owner of the inheritance ought at once to take the proceeds; and the fairest rule would seem

Proceeds of equitable waste.

to be to settle the sum as near as may be on the terms of the estate from which it was derived, and let all interested take accordingly. (*Lushington* v. *Boldero*, 15 Beav. 1, and 13 Beav. 418; *Seagram* v. *Knight*, L. R. 2 Ch. 628; *Honywood* v. *Honywood*, L. R. 18 Eq. 306.) Thus, where a tenant for life impeachable for waste committed legal waste, the proceeds were invested, and the income paid to her for life, and on her death the proceeds were paid over to the next tenant for life, who was without impeachment for waste. (*Lowndes* v. *Norton*, 6 Ch. D. 139.)

Permissive waste.

Next, as to *permissive* waste. As to the English rule there is much doubt and conflict of decision. An injunction in such a case would be clearly mandatory, but it does not therefore follow that one ought not to be granted, though probably an English court would refuse one. (*Powys* v. *Blagrave*, 4 D. M. & G. 448.) As to buildings, irrigation works, protective embankments, and so on, permissive waste might often lead to irremediable damage; and certainly if the tenant for life is liable for their up-keep, it is difficult to suggest why he should not be restrained by an injunction from a breach of such duty. A tenant for years is liable for permissive waste (*Davies* v. *Davies*, 38 Ch. D. 499); but not so a legal tenant for life unless he is expressly made liable. (*Avis* v. *Newman*, 41 Ch. D. 532.) The only difficulty is where no express duty to repair is imposed by the instrument which creates the estate; and it has sometimes been suggested that there is a distinction between a tenancy for life created by an instrument (as a settlement without any express provision), and one created by operation of law, as where a Hindu widow succeeds to a life-tenancy in her husband's estate. I doubt if there is any good ground for such a distinction, or that it would not be as reasonable and proper to imply such a duty where a life-tenancy is created by an instrument which is simply silent on the point, as it is where the tenancy arises by operation of law. As a general rule, therefore, I would suggest that a tenant for life is bound to make all ordinary repairs essential to prevent the destruction of the property; but he is not liable to repair extraordinary damages, as by floods, lightning, &c., nor to replace the substance of the thing, his duty being affected by the condition of the property when he took possession, and it being sufficient that he leaves the premises in as good repair as when he received them, saving all reasonable wear and tear. (*Woodhouse* v. *Walker*, 5 Q. B. D. 404.)

Though cases of waste by tenant for life are commonly in respect to real property, such a case might very well occur in respect to personal property, as where the bulk of the property in which a Hindu widow has a life interest, consists of money invested in stock or shares, and the waste alleged may consist of a needless or improper change of investments exposing the capital to depreciation or loss. (*Hurrydoss Datt* v. *Uppoornah Dossee*, 6 Moore's I. A. 433.)

Waste of personal property.

Cases of waste often occur between mortgagor and mortgagee. If a person has mortgaged his estate for a loan and continues in possession, it is obviously a breach of faith that he should commit such waste of the property as to render the property valueless as a security, and hence a mortgagee may obtain an injunction to restrain the cutting down of timber. But it is not a matter of course; for if the security is sufficient, it will not be granted, but a special case must be made out. The difficulty is as to what is meant by a "sufficient security." No prudent mortgagee would lend his money where the value of the property barely covers the loan; and acts that would reduce it to this would-be waste. It is rather a question of prudence than of actual value; and the point is whether the act will substantially impair the value, which was the basis of the contract at the time it was made. (*King* v. *Smith*, 2 Hare, 243.) By s. 66, Act IV of 1882, as to commissive waste, it is laid down that a security is or becomes insufficient unless there is an excess of one-third, or, in respect to buildings, of one-half above the sum due on the mortgage. A mortgagor in possession will not be restrained from cutting underwood (for that resembles a crop) except at unseasonable times, and contrary to the usual course of husbandry. (*Humphries* v. *Harrison*, 1 J. & W. 581.) But as soon as the mortgagor has become insolvent, it will be otherwise, for then the mortgagee has a right to the estate in that plight in which it was at the date of the insolvency, and to prove for the rest of the debt. (*Hampton* v. *Hodges*, 8 Ves. 105.) Still, it seems the mere cutting of timber, even then, must be such as to make the security inadequate. (*Cox* v. *Goodfellow*, 8 Ves. 105.) As to commissive waste there is little doubt, but in respect to permissive waste the mortgagor is not, in ordinary cases at least, bound to repair or to keep the estate in good order; still in a case of negligence rapidly impairing the security, in which justice manifestly required it,

Waste as between mortgagor and. mortgagee.

the court might rightly interpose to protect the mortgagee. (4 Kent's Com. 178, 180.) By s. 66, Act IV of 1882, it would seem that in no case is a mortgagor liable for permissive waste.

Where mortgagee is in possession.

If a mortgagee is in possession, though the fee simple be in him, yet if he cuts down timber, opens mines, or does other waste, except with the leave of the mortgagor, or the security be insufficient, or if he does not apply the proceeds in sinking the interest and principal of his mortgage, there will be an injunction at the prayer of the mortgagor to restrain the waste. (*Farrant* v. *Lovel*, 3 Atk. 723; Coote on Mort., B. iii, c. v.) It is his duty to keep the premises in necessary repair out of the surplus rents if there be such. (Act IV of 1882, s. 76, cl. (*d*); *Sandon* v. *Hooper*, 6 Beav. 246; Coote on Mort., B. iii, c. iv; 1 Seton's Decrees, 398.)

General principle in these cases.

In all these cases the substance rather than the form is to be regarded; for mortgages may assume a great variety of form, being sometimes nothing more than an hypothecation; but some are usufructuary, others again appear in the form of a lease, sub-lease and security-bond; while in other cases there may be a conditional sale of the land. But whenever a question arises whether a mortgagor or a mortgagee in possession ought to be restrained from certain acts of waste, it ought not to be made to depend upon whether in form, the mortgagor is a mere tenant-at-will, or the mortgagee the absolute owner, or entitled to unlimited control for a term of years, but the substance of the transaction, as a security for a loan of money, between the parties, ought alone to be considered.

Waste between lessor and lessee.

As between lessor and lessee there may be cases of pure waste involving no mere breach of contract: as where a tenant is daily committing acts of destruction, as pulling down walls in the houses, cutting down trees and fences; or making material alterations in a dwelling-house, as by changing it into a warehouse or store, or by stopping up windows, substituting a new building for an old one, or by making other changes, even though they may greatly enhance the value of the premises; for the owner has a right to have his houses and lands kept in an unaltered state; and hence a tenant is bound to keep distinct, during the term, the hedge or other boundary between the land leased to him, and other land of his own adjoining.

(*Farrant* v. *Lee*, 1 Ambl. 95; *Douglass* v. *Wiggins*, 1 John. C. R. 435 (American case); *Smyth* v. *Carter*, 18 Beav. 78; *Spike* v. *Harding*, 7 Ch. D. 871. See *Doherty* v. *Allman*, 3 Ap. Cas. 709, cited *ante*, p. 347; *Conway* v. *Fenton*, 40 Ch. D. 512.)

Illustration (*n*) to s. 54.

Illustration (*n*) is an example of equitable or destructive waste being restrained as between joint owners of property. Where several are in joint and undivided possession of the same property, as coparceners, joint tenants, or tenants in common, each really has the full rights of an owner in respect to the enjoyment of the property. What acts then of such a tenant can be said to be in excess of such right of enjoyment? The result of the English cases seems to be that acts amounting to a destruction of the subject-matter will be restrained; and the general rule may be laid down that equitable waste will be, and legal waste will not be, restrained. (See *Job* v. *Potton*, L. R. 20 Eq. 84; cf. *Jacobs* v. *Seward*, L. R. 5 H. L. 464, a case of trespass by a co-tenant.)

Waste between co-tenants.

In one case a distinction was drawn between acts of pure equitable waste, and acts of destruction; but in this, as in all other instances, there is, I conceive, no line to regulate the interposition by injunction other than the recognised and well-established line between legal and equitable waste (*Hole* v. *Thomas*, 7 Ves. 589; *Turner* v. *Wright*, 6 Jur. N. S. 809; *Bailey* v. *Hobson*, L. R. 5. Ch. 180.) One co-tenant is not liable to contribute for improvements made by another (*Leigh* v. *Dickeson*, 15 Q. B. D. 60).

As between joint owners the somewhat abstrusely worded doctrine of the jurists is that, properly, all possession is always exclusive, and, therefore, where anything is possessed by several, it is only in appearance that the same thing is the subject of their possession, for each possesses a part only, and not the remaining parts; and it makes no difference, juridically considered, that there is not a real but only an imaginary separation of these parts from one another. (Savigny on Poss. 113, Perry's trans.) If we apply this doctrine to each of the subject-matters of joint ownership given in Illustration (*n*), we shall see how it necessarily results that between joint owners equitable waste will be restrained, but not legal waste. In English law there are nice distinctions between co-parceners, joint tenants and tenants in common, as to their respective interests in the joint property, and

the interest of undivided Hindus in the family property does not coincide precisely with any one of the three; but the above doctrine applies to and explains, in all cases alike, the mutual rights of apparently joint owners.

According to general and primitive Hindu law it is true that, "according to the true notion of an undivided family in Hindu law, no individual member of that family, while it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share" (per Lord Westbury in *Apposier* v. *Rama*, *s. a.* 10 Moore's I. A. 89). In Bengal, by usage, this has been somewhat modified. Each member, as each brother, has a definite share which descends to his heir, as widow, daughter, and so on. But by general Hindu law, the result of a death of a co-parcener is not that his heirs succeed, but that what would have been his on a partition falls into the common stock, or rather remains in the common stock, and the number of co-parceners may or may not be enlarged in consequence of the death, according to the degree of relationship to the ideal common ancestor. Hence in Hindu law proper, there is no succession or descent of joint family property. The *Malabar Tarwaad* illustrates this in the most complete manner. (Mayne's Hindu Law and Usage, 260, *et passim.*)

Partition not always adequate relief.

In English equity, the fact that where the parties are thus related to each other, the plaintiff has an effective remedy by partition, has been made a reason for refusing an injunction (*Goodwyn* v. *Spray*, Dick, 667); but at least as ancillary to a suit for partition, and pending the litigation, an injunction to restrain equitable waste cannot, on principle, be refused. (*Hawley* v. *Clowes*, 2 Johns. C. R. 122, American case.) It is obvious that in India as to many kinds of joint ownership, and especially in the case of undivided Hindu families, a partition would be a very great calamity to the innocent co-parceners; and it could not be suffered that one co-parcener should be able to offer to the others a choice between the alternative of submitting, either to a partition or to the destruction of the family or joint property. In England an injunction has been granted where it was shown that the tenant in common committing the waste, was insolvent (*Smallman* v. *Onions*, 3 Bro. C. C. 621); and where one tenant in common was, under a special agreement, occupying tenant, it was said, "If one tenant in common thinks proper by agreement with the other

to hold premises as an occupying tenant, the effect of that contract being to exclude the other from entry for any purpose, the tenant thereby has prohibited any act by himself but such as an occupying tenant may do:" and on this ground the tenant in possession was restrained from cutting timber or ploughing up ancient meadow. (*Twort* v. *Twort*, 16 Ves. 128.)

Limit to restraint.

The limit of the rule as to restraint is well shown in a case where five out of six tenants in common of a property under lease at an annual rent of £30, had granted a renewed lease to a railway company at an improved rent of £90, and the other co-tenant, refusing to concur in such lease, had recovered judgment in ejectment against the lessees, but the court refused to interfere, by injunction, to restrain that co-tenant from proceeding to remove iron rails laid down by the lessees. (*Durham, &c., S. Ry. Co.* v. *Wawn*, 2 Rail. C. 395.) Several owners, having a regard only to the prudent management of the same property, may very well differ in opinion as to the advisability of letting the land, at even an advanced rent, for the use of a railway company. It would, I apprehend, be the same, though one parcener were, in some degree, actuated by prejudice or personal feeling, provided the act itself was not more than legal waste. If co-parceners, acting *bonâ fide* and as prudent owners, cannot agree as to what is to be done or omitted, the sooner they come, to a partition, the better. Should the courts interfere in such cases and as to such matters, they might soon have to manage half the joint estates in the country. I submit, therefore, that there can be no injunction against acts of legal waste, except, possibly, as ancillary to a suit for partition with regard to the power of one Hindu co-parcener to bind his own unascertained share in the joint property, it is said in Mayne's Hindu Law and Usage, p. 331, that at Madras "in one case the court enjoined a father against alienating more than his share of the undivided property, but refused to interfere with alienations which appeared to be within his share,"—citing *Kanukurty* v. *Vencataramdass*, 4 Mad. Jur. 251. A case in 2 Mad. H. C. 270 is also referred to on the general power of a co-parcener to alienate.

Illustration (*o*) to s. 54.

Illustration (*o*) is an example of the relief by injunction being applied in a case of pure trespass. The facts are taken from the case of *Hodgson* v. *Dyce* (2 Jur. N. S. 1014), where on demurrer to the bill praying an injunction,

Stuart, V. C., said: "It has been suggested that for these trespasses an adequate remedy might be had at law, and that consequently it was beyond the province of a court of equity to interfere. Unquestionably a court of law would award damages in such a case, but damages against whom? The defendant is a pauper, and as against persons in her position, such a form of redress would be the merest mockery of justice." Such a case thus falls within either clause (*c*) or (*d*) of s. 54.

Cases of pure trespass.

Interference by way of injunction in cases of trespass was not secured in England till after much discussion and some vacillation; and though recent legislation has somewhat enlarged the powers of the courts as to injunctions, so that there is now no doubt as to their powers in these and other cases (and our courts in India have in terms equally wide powers), yet it has done nothing to alter the principles which have been laid down as to the exercise of their powers, where principles have been established as being just and convenient. (*Gaskin* v. *Balls*, 13 Ch. D. 329.) Trespass is the forcible invasion of another's right of possession; and it is an elementary rule that, without possession, actual or constructive, a man cannot bring trespass, though he may have the freehold in law. Hence those cases (sometimes discussed along with cases of trespass) in which the plaintiff is out of possession, and seeks an injunction to restrain acts by the person in possession who claims by title adversely to him, must be excluded; they fall under a head already considered (*ante*, p. 331) There remain, then, cases of pure trespass, and cases of trespass under colour of title. In the former, there will be an injunction to restrain irreparable mischief; but if the trespass be fugitive and temporary and adequate compensation can be obtained for such injury in the shape of damages, there is then no ground or necessity for an injunction (2 Story's Eq. 928) In the latter class of cases, the party complaining has been in possession of property, and has complained that his possession was wrongfully invaded by some alleged trespasser The alleged trespasser, on the other hand, has not admitted the possession of the plaintiff, nor claimed a right to invade such possession as he had, nor intended to do so—as in the case of the underground working of adjoining mines—and the court has distinguished these cases from ordinary cases of trespass, by saying the alleged wrong-doe

The ingredients of trespass.

Trespass under colour of title.

claimed *under colour of title.* Neither party disputes the abstract right of the other to that which he claims. The dispute is as to the practical application of the law to the facts of the case. (*Davenport* v. *Davenport*, 7 Hare, 217.) The distinction thus drawn is of practical value.

Examples of pure trespass.

In cases of pure trespass, the court must be guided by a wise discretion, according to the facts of each case. The case selected as Illustration (*o*) is a good example of a just interference. In a somewhat similar case, plaintiff had purchased and was in possession of various houses occupied by tenants. Defendant, the vendor, endeavoured to recover possession, but was defeated in an action brought for that purpose. Afterwards he persisted in causing constant annoyance to plaintiff's tenants, by issuing distress warrants against them. Plaintiff prayed for an injunction to restrain him from so distraining upon, or taking away the goods of, or otherwise molesting, his tenants. The injunction was refused, but solely on the ground that adequate relief could be obtained elsewhere. And seeing that the acts of the defendant were not productive of irreparable, nor, indeed, of any actual mischief to the property, and might be very well met by damages, the refusal was no doubt justifiable. But in courts constituted as ours, it would be a proper course to annex an injunction restraining from such acts of annoyance in future to a decree giving damages for the particular acts complained of. (*Best* v. *Drake*, 11 Hare, 369.)

In one singular case where the defendant, who alleged that he was really entitled to the property in question, instead of bringing a suit to establish his title, was continually entering upon the land and asserting his title thereto by doing some act, such as cutting timber, with a view, as he supposed, of preventing the law of limitation from running against him, a perpetual injunction was granted to restrain him from such acts in future. (*Lowndes* v. *Bettle*, 10 Jur. N. S. 226.) This case was followed by another very similar case, where the defendant (singularly enough a barrister) entered with the aid of the police, and cut down one tree, and threatened to cut down more. He had before sued the plaintiff, thus admitting his possession, and he now sought by showing an entry with title in himself, to acquire possession; but the court, treating his acts as mere acts of trespass which could not bring the fact of possession into controversy, granted a perpetual injunction. (*Stanford* v. *Hurlstone*, L. R. 9 Ch. 116.)

A case in which no pecuniary compensation would clearly have been any adequate relief, was where five plaintiffs, respectively, had purchased, and were in possession of private family vaults or graves, in perpetuity, in a private burial ground annexed to a chapel, but which was closed from further use, and the trustees were proceeding to level the ground and remove the tombstones. They were restrained from removing those belonging to the plaintiffs. (*Morland* v. *Richardson*, 2 Beav. 596.)

In another case where water-pipes had, without the consent of the owner of the soil, been laid in the soil of a highway, an injunction to restrain their continuance and the further laying of them, was granted. Here the ordinary remedy of himself removing the pipes from his land and suing for damages, was not open to the plaintiff, as the land was a highway which he could not touch; and the fact that the soil was of no real value to him, and that his real motive was that he was interested in another water company, was held to be immaterial. (*Goodson* v. *Richardson*, L. R. 9 Ch. 221.)

Examples of trespass under colour of title.

In cases of trespass under colour of title, it is clear that often it will be necessary, on account of the nature of the damage being done by the defendant, to grant a temporary injunction till the respective rights of the parties have been ascertained; and if it be then found that the defendant has in fact invaded the plaintiff's property, it will always be right to grant a perpetual injunction in addition to any decree for damages. Many cases of this kind have occurred in respect to mines, where the lands of plaintiff and defendant have been contiguous, and the question was whether the defendant was working or was about to work out of his proper bounds. (*Flamang's case*, 7 Ves. 309; *Mitchell* v. *Dors*, 6 Ves. 147; *Lonsdale* v. *Curwen*, 3 Bligh, 168; *Fletcher* v. *Walker*, ibid, 172.)

Illustration (*r*) to s. 54.

Illustration (*r*) is an example of such trespass under colour of title, and is in fact taken from one of the last cases cited.

The like remedy has been applied to taking stone from a quarry, or taking it for a purpose other than for what there was a right to take it (*Thomas* v. *Oakley*, 18 Ves. 184); to cutting timber on a disputed boundary line (*Kurden* v. *Jones*, 17 Ves. 110); to removing earth and stones from a sea-bank, and so exposing plaintiff's land to the risk of inundation (*Chalk* v. *Wyatt*, 3 Mer. 688); and in one case to the taking

down of a partition wall held in common (Cary, 90). In the case of mines, especially, the caution given in one case is valuable, that though the reason for granting a temporary injunction in such cases is that the exercise of the alleged right in the meantime would change, and deeply affect the property, yet, on the other hand, inconceivable mischief may ensue from upholding the injunction too long, as the value of the opportunity of working a mine, if lost, might never be recovered, especially if it is contiguous to other mines belonging to the same person, and that therefore the interposition of the court must be with a considerable pressure that, on the part of the plaintiff, there shall be no delay in proceeding to a trial and decision of the disputed right. (*Grey* v. *Northumberland*, 17 Ves. 281.)

Caution needed in such cases.

In one modern case, the owner of a garden, over which the tenants of his adjoining houses had rights of enjoyment and management, obtained an injunction to restrain continuing trespasses involving nuisances in the garden, and the removal of the gravel and soil, committed by a person acting under colour of a contract to improve the garden, entered into between him and the tenants. (*Allen* v. *Martin*, L. R. 20 Eq. 462.)

There have been cases in which a stranger, acting in collusion with the tenant of the plaintiff, has entered and done acts in the nature of waste, and then set up an adverse title to the plaintiff. These are, perhaps, rather cases of waste than of trespass; but, anyhow, the true ground for the court not hesitating to interfere is the way in which the defendant has obtained possession, for, there being a clear breach of the tenant's duty to his landlord, the defendant's title is to be taken as no better than the tenant's. (*Courthope* v. *Mapplesden*, 10 Ves. 289; *Norway* v. *Rowe*, 19 Ves. 154.)

In cases of trespass there is sometimes, as a further reason for an injunction, the need of preventing a multiplicity of suits; and this may be either before or after a decision upon the right in litigation. Thus in an early case where such an injunction was granted, it was said that it was certain that where a man sets up a general exclusive right, and where the persons who controvert it with him are very numerous, and he cannot by one or two actions quiet that right, an injunction would

Preventing a multiplicity of suits may be a ground in cases of trespass.

be a proper relief till the right could be determined; as otherwise there would be no end of bringing actions of trespass, since each action would determine only the particular right in question between the plaintiff and defendant. (*Lord Tenham* v. *Herbert*, 2 Atk. 483.) But in such a case, the injunction should not be granted unless upon strong, probable, and pregnant evidence that the parties to be restrained will not suffer in the meantime; and not also where there has been a want of diligence on the part on the plaintiff in seeking to establish his alleged exclusive right. (*Hanson* v. *Gardiner*, 7 Ves. 309.)

Illustration (*p*) to s. 54 is an instance of such.

Illustration (*p*) is an example of an injunction granted after a decision in favour of the exclusive right. Illustration (*a*) to s. 42 supposes that a suit for a declaration of such right may be brought; and in Illustration (*p*) it is of course assumed that the suit has been so brought, as, under s. 43, to be binding upon all the inhabitants of the village as a body. It is true that in the Illustration the injunction is supposed to be limited to restraining the suing upon such right; but it might also have been to restrain the doing any acts under the pretence of such right. Illustrations (*p*) and (*q*) are both here inserted as examples of clause (*e*), s. 54; and the two together show that a multiplicity of suits as to any kind of right may thus be restrained. The *ratio decidendi* in such a case as that put in Illustration (*q*) is that, from the moment of such a decree for administration, the court proceeds on the ground that the decree is a judgment in favour of all the creditors, under which all creditors or legatees may claim, and all are to be paid according to their respective rights and priorities; and that, therefore, the just administration of the assets would be greatly embarrassed, and the court could not execute its own decree, if other suits were to be permitted. (See Williams on Exors, P. x, Bk. i, Ch. ii.)

Illustration (*q*) to s. 54.

Illustration (*r*) to s. 54.

Illustration (*r*) has been already referred to (*ante*, p. 311), and I will only add here that the right of support is pre-eminently one for the protection of which an injunction may be an essential relief; and this either before or after there has been a decision upon the existence of such a right in any particular case. It is obvious that the invasion of such a right, where it exists, may work irreparable

mischief, and that prior to any decision upon it, far less inconvenience or probable damage will generally arise from granting than from refusing a temporary injunction. A reasonable probability of damage is a sufficient ground for an injunction; as where there is danger that A, by working mines within certain limits of B's land, will let it down. And if A sells land to B for the known purpose of building on it, he impliedly covenants that he will not do anything on the land he retains, to injure B in the proposed use of the land bought by him. (*Siddons* v. *Short*, 2 C. P. D. 572.)

Protection of easements and other like rights by injunction.

The right of support is one existing by reason of vicinage, and is very varied, as the right of support of land by land, of buildings by land, or of buildings by buildings. Its consideration might be divided into the lateral support of land by adjacent land, the vertical support of the surface by the subsoil (where the property in the two is distinct), the support of buildings vertically by subjacent soil, the support of buildings laterally by adjacent soil, and the support of buildings by buildings in juxtaposition. In some of these instances, the right is a natural right, in others it is an acquired right, that is, an easement; and in all an injunction (either temporary or perpetual) may be an appropriate or necessary relief. But it would not be practicable here to enter upon the consideration of all these instances of the right of support, or to discuss the various incidents of such right. The right to the use of water is another and very analogous example of an obligation existing from one man to another by reason of the vicinity of their property, and such right may be either a natural or an acquired right, and may relate to either surface or subterranean water, and may affect either natural or artificial streams. The invasion of such right may sometimes involve a nuisance, as where it consists in fouling a stream of water. In respect to the pollution of a stream, an injunction may be the only adequate remedy, as there is no knowing what new use of the stream may not be thereby prevented. In respect to a right to light or air injured by a permanent erection, damages for the whole injury, namely, the depreciated value of the property, may be given; but in respect to the right to water, the damages can be only for the past, and not for any future injury; for the cause of injury may vary, and may cease or may increase at any time. Hence any pollution of a clear stream is both injury and damage, whilst the pollution of a stream already made foul and useless by other pollutions is an injury

without damage, which would, however, at once become both injury and damage on the cessation of the other pollutions. (*Pennington* v. *Brinsop, H. C. Co.*, 5 Ch. D. 772; *Crossley* v. *Lightowler*, L. R. 2 Ch. 478.) Similarly, where two men's properties adjoin, and abut upon a highway or navigable river, each has a right to use it in a reasonable way, as by unloading carts or ships, though in so doing the cart or ship may overlap the neighbour's frontage; and the neighbour may by injunction be restrained from hindering such use. But this use must not interfere with the neighbour's own right of access, or like use of his own frontage. (*Original Hartlepool C. Co.* v. *Gibb*, 5 Ch. D. 713.) Further, there are many other rights of easements (strictly so-called) to which the *festinum remedium* of an injunction may be appropriately applied. Such are especially easements of necessity, as rights of way of necessity, and the continuous and apparent easements of drains from a house, and so on. So easements as to light and air are constantly protected or continued by means of injunctions. In *McManns* v. *Cooke* (35 Ch. D. 681), an easement of light was protected by a mandatory injunction so as to be a specific performance of a contract, part performed by the plaintiff. It must here suffice to indicate the appropriateness of the remedy by injunction for the invasion of such rights, without attempting to define or discuss the nature and incidents of such rights. But with regard to the application, for their protection, of the remedy by injunction, the general rule is that it is necessary, in order that an injunction should be granted, for the plaintiff to shew that there will be a permanent obstruction to the access of light or air to such an extent as to render the occupation of his house less comfortable than it was before, or to prevent the present tenant from carrying on his business as beneficially as he could before, or that the plaintiff, as owner of the reversion, will suffer substantial or material damage by the lessening of its value. If such substantial injury be not proved, there will, generally, be neither damages nor an injunction given. (*Kino* v. *Rudkin*, 6 Ch. D. 165.) Still the plaintiff is entitled not only to sufficient light for his then business, but to all the light theretofore enjoyed, or which might thereafter be needed, by him; and that the plaintiff obtains from other sources even more light and air than he had before, may be no defence of a material obstruction by the defendant. (*Moore* v. *Hall*, 3 Q. B. D. 178; *Dyers Co.* v. *King*, L. R. 9 Eq. 438; *Parker* v. *First*, A. H. Co., 24 Ch. D. 282, 286.) *Newson* v. *Pender* (27 Ch.

D. 43) was a case in which, on a balance of convenience, an *interim* injunction (subject to an undertaking by plaintiff to speed the action) was granted to restrain the erection of a building which would obstruct the light coming to the windows in a house recently re-erected, but where in the old house there had been ancient lights, but in the new house these had been greatly altered and were only partly identical with the old. The legal effect upon the ancient right of light of such alterations was not decided, though the leading case of *Tapling* v. *Jones* was much discussed, especially at p. 60 *et seq.* The same case was also explained in 9 Ap. Cas. 185. The owner of the dominant tenement may have an injunction to restrain such a use of the servient tenement as shall materially interfere with his right to repair and keep in repair the water-course or other easements in its course through the servient tenement, *e.g.*, building a house over a water conduit. (*Goodhart* v. *Hyett*, 25 Ch. D. 182.) The more difficult question in this class of cases is whether, under either clause (*b*) or (*c*) of s. 54, damages may not be ascertainable, and afford ample and adequate relief in lieu of an injunction. On the one hand, whether the injury is merely threatened or has been substantially done, the defendant ought not to be allowed practically to deprive the plaintiff of the enjoyment of his property by giving him a price for it in the shape of damages; and it should thus make no difference whether the injunction sought is an ordinary or a mandatory one. (*Smith* v. *Smith*, L. R. 20 Eq. 504.) Hence, if in either case the damages cannot be ascertained, or will not be an adequate relief, the injunction ought to be granted. But, on the other hand, the fact of the obstruction being completed before the injunction was asked for, is material where the relief by damages is available; and then the consideration will arise, what is the comparative injury caused in point of value and damage as regards the removing of the obstruction with a view to restore the enjoyment of the light or air. If the injury to the defendant by removal will be out of all comparison to the injury to the plaintiff by the obstruction, and much more if the plaintiff at the same time derives some other and compensatory benefit from the building (though this is never a matter to be taken into account in measuring the amount of damages), this may suffice to turn the balance of convenience in favour of the relief by damages rather than by injunction. (*National P. Co.* v. *Prudential A. Co.*, 6 Ch. D. 761, 769; *Aynsley* v. *Glover*, L. R. 18 Eq. 552-5.) Questions of this kind will thus occur most

frequently where the injunction sought will be mandatory, a class of injunctions to be considered hereafter under s. 55. Where the light and air to certain windows of a person's house is to some extent obstructed, though the house is not rendered uninhabitable by the obstruction, an injunction would not be granted, the plaintiff being awarded damages instead. But each case must entirely depend upon its particular circumstances. (*Holland* v. *Worley*, 26 Ch. Div. 578; *Dhunjibhoy Cowasji Umrigar* v. *Lisboa*, I. L. R. 13 Bom. 252.) In determining whether pecuniary compensation is sufficient in any particular case the Bombay Court follows the ruling in the English case of *Holland* v. *Worley* noted above, that "damages should be given where the injury is not so serious that the property might not still remain the plaintiff's and be as substantially useful to him as before." Applying that rule to the case before them the Judges finding that plaintiff's room would clearly not be as substantially useful as before, and that damages would not be an adequate compensation, granted a perpetual injunction against the defendants restraining them from raising their wall so as to obstruct plaintiff's light and air. (*Kadarbhai* v. *Rahimbhai*, I. L. R. 13 Bom. 674.) It is purely a matter of discretion for a court to grant a perpetual injunction, and unless that discretion is shown to have been exercised wrongly, the court of appeal would decline to interfere with the order of a subordinate court. So the High Court refused to interfere with the order of the lower appellate court granting a perpetual injunction against the defendant, a co-sharer of plaintiff, from erecting a building on common ground. (*Shadi* v. *Anup Singh*, I. L. R. 12 All. 436.) In a case where plaintiffs who were priests ordinarily conducted their patrons to a certain shrine and performed worship there on their behalf, and the defendants, the ministers at the temple, made a rule that people should in the future be prohibited from entering certain sacred portions of the temple except on payment of certain fees, the court granted a perpetual injunction as the defendants had threatened to invade plaintiff's enjoyment of property, and the invasion was such that pecuniary relief would not afford adequate relief. (*Kalidas Jivram* v. *Parjaram Hirji*, I. L. R. 15 Bom. 309.) The court would order the demolition of a dwelling-house erected by a tenant possessing occupancy rights upon zemindari lands used solely for agriculture. Such a user would entirely alter the character of the land. (*Ramanadhan* v. *Zemindar of Ramnad*, I. L. R. 16 Mad. 409.) There is no such broad proposition

that one co-owner is entitled to an injunction restraining another co-owner from exceeding his rights absolutely, and without reference to the amount of damage sustained by the one side or the other from the granting or withholding of the injunction. (*Shamnugger Jute Co.* v. *Ram Narain Chatterjee and others*, I. L. R. 14 Cal. 189.) Before an injunction is issued in favour of one against another co-sharer, directing that a portion of the property alleged to have been dealt with adversely should be restored to its former condition, the plaintiff must show that he has sustained some substantial injury that affects his position. The fact that a portion of the land on which defendant had excavated a tank was fit for cultivation was not considered as inflicting any injury of a substantial nature on the plaintiff such as would justify the court in putting defendant to the expense of refilling it. The proper remedy was said to be for the parties to partition the land so as to hold exclusively that which represented their respective shares. (*Joy Chunder Rukhit* v. *Bippro Churn Rukhit*, I. L. R. 14 Cal. 236.) If the right to light or air is not the ordinary easement, but a right created by a special contract, then probably strict regard will be paid to the terms of the contract, and an injunction be granted without regard to the amount of damage. (*Leech* v. *Schweder*, L. R. 9 Ch. 463.)

Illustrations (*s*) and (*t*) to s. 54.

Illustrations (*s*) and (*t*) are examples of another class of cases, that of *nuisances*, in which an injunction is an indispensable remedy. But nuisance is a term capable of a very wide sense; the word means annoyance, and so anything that works hurt, inconvenience or damage, and might thus include any infringement upon the enjoyment of territorial or personal rights. If one digs a trench across a public road, it is a *public* nuisance;

Nuisances.

and if a person falls into it and is hurt, he may have an action against the wrong-doer; but then the act was an invasion of a general right of all to use the road. Again, if A builds on his own land so as to darken the ancient lights in B's house, it is a *private* nuisance; but then the right of B against A is not one existing by general or common law, but arises from grant or prescription, and the act of A is the invasion of an easement. Hence it is better to exclude such cases, and to limit the term nuisance, as in the illustrations, to where one so uses his own real property as to invade the common law rights of others

Meaning of the term.

in their real property. In this sense of the term also, a nuisance may be either a public or a private one. It is a *public* nuisance when it is such in its nature or consequences as to be a damage to all persons who come within the sphere of its operation, though it may be so in a greater degree to some than it is to others; a factory emitting volumes of noxious smoke or poisonous effluvia, is such. When the thing complained of is such as to be a great annoyance to those immediately within its operation, but none whatever, or even pleasurable, to those more removed from it, it is a *private* nuisance; such would be the perpetual ringing of bells, or performance of music to a neighbour. (*Soltau* v. *De Held*, 2 Sim. N. S. 133; *Benjamin* v. *Storr*, L. R. 9 C. P. 400; *Fritz* v. *Hobson*, 14 Ch. D. 555.) Though a nuisance be a public one, yet if a private person suffers a special and distinct damage from it, he may have an action. The remedy for a public nuisance is by a criminal proceeding; for a private nuisance, or for special damage from a public one, by a suit for damages with an injunction to prevent the continuance or repetition of the injury.

Instances of nuisances.

Nuisances, even in the above restricted sense, may be very various; thus, the setting up of noxious or noisy trades, as limekilns, tanpits, forges; or the erecting privies or making cesspools, or burning lime or bricks so near to a dwelling-house that the smoke and smell enter the house, are nuisances. But to constitute even a private nuisance, the inconvenience must not be merely fanciful, but one materially interfering with the ordinary comfort, physically, of human existence, according to plain, sober, and simple notions of living. (*Walter* v. *Selfe*, 4 DeG. & S. 135.) Though mere diminution in value of the plaintiff's property does not, by itself, constitute a nuisance, yet the extent of the nuisance, if it be a nuisance, may be materially shown by this. (*Soltau* v. *De Held*, 2 Sim. N. S. 133.)

When trades are nuisances.

Although the carrying on of a lawful trade does annoy another to the extent of rendering his residence less agreeable, yet it will not be an actionable nuisance, if, having regard to place and time, the act was an ordinary, reasonable and proper use of the land by the defendant, not substantially incommoding the plaintiff. (*Bamford* v. *Turnley*, 9 Jur. N. S. 377; *Cavey* v. *Ledbetter*, id., 798; *Wanstead* v. *Hill*, id., 972; Gale on Easements (3rd ed.), 409; *Salvin* v. *North B. C. Co.*,

L. R. 9 Ch. 705; *Sturges* v. *Bridgman*, 11 Ch. D. 865.) It will be so if real sensible damage is done to property, though the business was an ordinary one, carried on in a proper manner, and in a place more or less devoted to like purposes. (*St. Helen's S. Co.* v. *Tipping*, 11 Jur N. S. 785.) And the carrying on, in the ordinary and obvious manner, a lawful trade, is not necessarily carrying it on in a proper manner if the annoyance might have been avoided by certain expedients and it is for the defendant to show that the trade is lawful, and carried on in a lawful and convenient place and manner. (*Stockport W. Co* v. *Potter*, 7 Jur. N. S. 880; 7 H. & N. 160.) But there may be a right by prescription to carry on a noxious or noisy trade in a particular spot; but until such prescriptive right is acquired, it is no answer that the nuisance existed before the plaintiff went to live near it, or even, perhaps, before his house was built. (*Bliss* v. *Hall*, 5 Scott, 500 Gale on Easements, 388—404; *Tipping* v. *St. Helen's S. Co.*, L. R. Ch. 66.) When such prescriptive right has been acquired, it is an easement, but prescription does not begin till the noise or other annoyance is such as to be a nuisance, and this may depend on a change of circumstances; for noise may not be such as to be actionable while land is open, but may become so when it is built upon. (*Sturges* v *Bridgman*, 11 Ch. D. 855.)

The question who is liable for a nuisance is not always an easy one

Who is liable.

He whose neglect of a duty is the proximate cause of damage, is liable, though there was also a duty on some third person, which, if performed, would have left the other's neglect without consequences. (*Harrison* v. *G. N. Ry. Co* 10 Jur. N. S. 922; *Collins* v. *M. L. Com.*, L. R. 4 C. P. 279.) So, every person who does or directs the doing of an act which cannot be done at all without constituting a nuisance, is personally responsible whether he was acting for himself, or for or on behalf, or for the benefit of another; and whether he is a principal and employer, or a mere servant carrying into effect the orders of his master. But if the act is lawful, and may be done without causing a nuisance, then the liability depends upon whether the person is a servant, or a contractor or sub-contractor. The difference is between committing work to a contractor from which, if properly done, no injurious consequences can arise, and handing over to him work from which mischievous consequences will arise, unless preventive measures are taken. In the former case the contractor alone is liable, the act being lawful, and his

negligence a casual act in the course of doing it; in the latter both are liable; for the injury arises from the act contracted to be done, and the principal cannot shift his responsibility on to the agent employed to do it. (*Bower* v. *Peate*, 1 Q. B. D. 326; *Angus* v. *Dalton*, 4 Q. B. D. 134.) Where there is a covenant for quiet enjoyment, there may be a breach of covenant by noise amounting to a nuisance. (*Jenkins* v. *Jackson*, 40 Ch. D. 71.) In *Sellors* v. *Local Board, Mattock*, (14 Q. B. D. 928), a mandatory injunction was issued against the local authorities for erecting a public urinal so as to be a nuisance to a private house.

When a landlord is liable.

Sometimes a landlord may be liable, though the premises are occupied by his tenant. Thus, where the very existence of the thing demised constitutes a nuisance, the landlord is responsible; as where privies are erected in such a situation that the use of them must necessarily create a nuisance. But if he demises premises which are not in themselves a nuisance, but may or may not become a nuisance according to the mode in which they are used by the tenant, the landlord cannot be made responsible for a nuisance created upon them by the tenant. He is not responsible for enabling the tenant to commit a nuisance if he pleases. But he cannot get rid of his responsibility for an existing nuisance by leasing the land to another, nor by renewing a lease of land on which the tenant has erected a nuisance; nor by allowing a lease to continue where the tenancy is such that he might have terminated it in order to abate the nuisance. (*Rex* v. *Pedly*, 1 Ad. & E. 822; *Rich* v. *Basterfield*, 4 C. B. 783; *Gandy* v. *Jubber*, 10 Jur. N. S. 652.) So an occupier is liable where the nuisance is from the acts of one to whom he grants a license to come upon his land and do there certain acts which cause the nuisance. (*White* v. *Jameson*, L. R. 18 Eq. 303.) Though an enactment may require that some previous notice of action (as a month's notice) should be given to a local board or other authority, this will not prevent an injunction being immediately granted, where it is necessary to prevent some immediate and irreparable injury, as a nuisance. Otherwise this would be a license to such authority to do any mischief they pleased, whilst the month's notice was running. (*Flower* v. *L. B. of Low Leyton*, 5 Ch. D. 352.) Where a drainage system was made by the landlord, and one tenant misused it so as to damage the premises of another tenant, it was held that the landlord was not liable for damages from the

nuisance, but only for what arose from the ordinary user when the drainage was defective. But he would be liable under a covenant for quiet enjoyment though the plaintiff's possession was not interrupted. (*Sanderson* v. *Berwick*, 13 Q. B. D. 547.)

Who may sue for a nuisance.

As to who may sue for a nuisance; if the property injuriously affected is in the occupation of tenants, the landlord or reversioner has no right of action, unless the nuisance is of a permanent character, and necessarily inflicts a lasting damage to the inheritance, as where it is by reason of the erection of a building which would, if allowed to continue, impose a servitude upon the plaintiff's building. The difference is between a mere continuing nuisance, every act of which gives a right of action, and so may be stopped at any time, and consequently by the reversioner as soon as ever he comes into possession and one arising from a permanent act, as the erection of a building, in favour of which the lapse of time will confer a prescriptive right. (*Tucker* v. *Newman*, 11 Ad. & E. 40.) There would be no injunction against a public body where there would be no mandamus and where the public body could not themselves abate the nuisance but only sue others in respect of it. (*Attorney-General* v. *Dorking Union*, 20 Ch. D. 595; *Charles* v. *Finchley*, *l. b.*, 23 Ch. D. 767.)

Where the nuisance is doubtful.

We are now assuming that there is no question that the act complained of does or will constitute a nuisance; for whenever such a question does arise, it will be by way of defence to the suit; and if the nuisance is merely contingent upon how the act threatened is carried out, or if it is otherwise not reasonably clear that it will be a nuisance at all, the court must guide itself by s. 56, clause (*g*), which will be discussed hereafter.

Illustration (*u*) to s. 54.

Illustration (*u*) is an example of the first of several classes of cases unconnected with immovable, and sometimes with any object of movable property in which the remedy by injunction is applied to prevent an invasion of a right of property which would result in pecuniary loss to the plaintiff.

Patent cases.

Patent rights are the creation of the law, and the nature and extent of those rights must be gathered from the special enactments on the subject. Here my remarks must be limited to the principles that govern the grant of injunctions when such rights have been acquired. Illustration

(*u*) contemplates the case of a perpetual injunction, and then, as shown in the illustration, two things must be established: (1) the existence of a valid patent; and (2) its infringement by the defendant. These being proved, the plaintiff's right to an injunction is generally very clear, and the usual form of it is to include the defendant's agents and servants. A man cannot have a patent for a principle alone, but may have one for a principle coupled with a process by which the principle may be carried into effect. He can only claim to work out his process by means of material known at the date of the patent; he cannot claim the use of materials discovered subsequently, and his specification will be construed with regard to this consideration. Where a patent is for a process arriving at a known result, any person may use another process without its being an infringement. But where the patent is for a new result, coupled with an effectual process, the patentee is protected from the use of any other process for the same result. (*Per* Pearson, J., *Badische, etc.*, v. *Lerustein*, 24 Ch. D. 156.) In one singular case, though the principal was not sued, yet a perpetual injunction was granted against his representative. There a ship was fitted with pumps which were an infringement of the plaintiff's patent, and though the owners were not made defendants, but only the master, who did not, however, pray that the owners might be joined, an injunction was granted against his using the pumps. It is not clear whether the effect was mandatory, so as to require the master to remove the pumps, to do which would be beyond his authority, or whether it was enough if he did not put the pumps to their proper use. The case is, anyhow, a strong one. (*Adair* v. *Young*, 12 Ch. D. 13; *Upmann* v. *Forester*, 25 Ch. D. 234.)

Caution as to temporary injunctions in such cases.

But the real difficulty in patent cases is in the exercise of the court's discretion as to temporary injunctions. There are many cases in which it is not clear either that the patent is legally valid, or that it has been infringed. It depends on the degree of doubt which exists on these questions, whether the court will grant an *interim* injunction. In such cases it will cautiously consider the degree of convenience or inconvenience to the parties by granting or not granting the injunction. It may either refuse to grant the injunction simply, or it may refuse it on the terms of the defendant undertaking to keep an account. (*Bridson* v. *McAlpine*, 8 Beav. 229, 230.) In some cases, the injunction, by stopping extensive works, may do a mischief to the

defendant, if in the right, which can never be repaired; while in the case of a defendant whose circumstances are such as to render it improbable that he will be able to meet the damages to which he would be liable if unsuccessful, the court naturally inclines to a ready use of its powers. So also, if the patent has been granted for some length of time, and the patentee has put the invention into public use, and has had an exclusive possession of it under his patent for a period of time, which may fairly create the just presumption of an exclusive right, the court would, in such case, ordinarily interfere, by way of a temporary injunction, pending the proceedings. (2 Story's Eq. 934.) So also, if the plaintiff has already, in suits against others, established the validity of his patent, this may justify a temporary injunction, though the defendant is not, of course, concluded by such prior decisions. (*Bovil* v. *Goodier*, L. R. 2 Eq. 195.) So also, if the result of not restraining the defendant pending the suit will be that he may go on selling the invention to many others, and so drive the plaintiff into a multiplicity of suits, this may justify an *interim* injunction. (*Plimpton* v. *Spiller*, 4 Ch. D. 286.) Generally, where there is a *primâ facie* case of an infringement of a patent, the length of time for which the patent has been enjoined will influence the discretion of the court. (*Davenport* v. *Richard*, 3 L. T. (N. S.) 503.) So where plaintiff and defendant had been partners, and the patent had been worked during the partnership under circumstances to show that the defendant did not then dispute the validity of the patent, a temporary injunction was granted. (2 Coop. C. C. 61.) A license to manufacture in Belgium does not include a right to sell in England where there is an English patent. In this case the defendant issued circulars warning the public against buying in breach of their patent. The court pointed out the great necessity for caution as to granting a temporary injunction to restrain the issue of such circulars. (*Tilghman's Co.* v. *Societé Anonyme etc.*, 25 Ch. D. 1.) The intervening bankruptcy of a defendant against whom an injunction has been granted does not bar his right to appeal. (*United Telephone Co.* v. *Bassano*, 31 Ch. D. 630.)

Where such injunctions should be refused.

But where the patent is of recent creation, and its validity is disputed, then, apart from other circumstances, such an injunction ought not to be granted. (*Whitten* v. *Jennings*, 6 Jur. N. S. 164.) So, where the plaintiff has lain by, and permitted a large expenditure to

be made in contravention of the rights for which he contends, he is not entitled to call upon the court for its summary interference. Where an undertaking by the defendant to keep an account will afford ample means of doing justice to the plaintiff—as where the profits made by the defendant are capable of being easily ascertained, and would generally be no very inadequate compensation to the plaintiff for the infringement—the court rarely grants an *interim* injunction. If, after all, the plaintiff is not entitled to the injunction it is not always easy to compensate the defendant; and an order that the plaintiff shall undertake to compensate the defendant for the loss in meanwhile stopping his manufactory, is not usual. Where there is one question whether a patent is valid, and another question whether it has been infringed, the court would be going a great way if it took upon itself to grant an *interim* injunction; and where the only question is the validity of the patent, to justify such an injunction, the possession and enjoyment under it should have been not only long but undisturbed and exclusive. (2 Coop. C. C. 57—60.)

Cases for a perpetual injunction.

But an injunction may be granted, after the expiration of the patent, to restrain the sale of machines manufactured in violation of the patent while in force; and a plaintiff may be entitled to an injunction, though a defendant undertake that there shall be no further infringement, for a plaintiff is entitled to say that he will not be satisfied with the undertaking. (1 R & M. 166 (note); 2 Coop. C. C. 59) To manufacture abroad according to a process patented in India, and then import the substance for sale in India, is a violation of the patent. (*Von Heyden* v. *Neustadt*, 14 Ch. D. 230; *Walton* v. *Lavater*, 6 Jur. N. S. 1251.) To import such pirated articles for purposes of experiment or instruction is a user for advantage and an infringement of the patent. *United Telephone Co.* v. *Sharpler*, 29 Ch. D. 164.) Lastly, it should be noticed that a patent is a privilege granted by the crown, but as against subjects only, and not against the crown; and hence the crown may, by its officers, servants, or agents, use a patent process without compensating the patentee; but this does not extend to a tradesman who contracts to do work for the crown, and in doing it uses the patent process, but he is liable to the patentee. (*Dixon* v. *London S. A. Co.*, 1 App. Cas. 632.)

Illustration (*v*) is an example of another and very analogous class of cases; for copyright, like patent right, is the creation of the law. The illustration also includes the usual exception to the existence of copyright. The cases on this subject are very numerous and important, but having regard to the infrequency in practice of such suits in our courts in India, it will probably suffice to limit my remarks to a summary of the results of the cases, so far as they bear upon the grant of an injunction. By Act XX of 1847, the authors or publishers of books, or of articles in periodicals, are entitled to the copyright, or exclusive privilege of printing and multiplying copies thereof, during certain limited periods. It is obvious that the invasion of such right is not only, in each instance, taking from the author or publisher (as the case may be) the profit upon the individual book which he might otherwise have sold, but it may also be injuring him to an incalculable extent, in regard to the value and disposition of his copyright, which no inquiry for the purpose of damages could fully ascertain. An injunction is thus the only preventive remedy, not only for the particular invasion, but also against its indefinite repetition in future. (2 Story's Eq. 932, 3.) It must be taken as now settled law that copyright is a property created by express enactment, and not resting on general or common law. (*Donaldson* v. *Beeket*, 7 Bro. P. C. 88; *Reade* v. *Conquest*, 7 Jur. N. S. 265; 2 Kent's Com. 477; *n*). Hence the necessity that the plaintiff should be able to show a title in compliance with the terms of the enactment creating the right. Hence, also, the exception that no copyright could exist at common law, and much less can be taken to have been created by express law, in a book which is itself a violation of the law, by being libellous or obscene, or, as English cases put it, in a book which is immoral, libellous or seditious. (*Walcot* v. *Walker*, 7 Ves. 2; *Southey* v. *Sherwood*, 2 Mer. 435.)

Illustration (*v*) to s. 54. Copyright cases.

What constitutes a piracy of a book is often an embarrassing inquiry; but it seems settled that it is not an invasion to make *bonâ fide* quotations or extracts from a book, or a *bonâ fide* abridgment of it, or to make a *bonâ fide* use of the same common materials in the composition of another work. (2 Story's Eq. 939; *Wilkins* v. *Aikin*, 17 Ves. 426.) But abridgments are not much favoured; and whether an abridgment is a piracy or not, depends not only upon the quantity, but the value of the matter extracted; and if the result is, in effect, to substitute the

What is a piracy.

one work or the other, it is a piracy; but the point where a damage and consequent injury may be perceived, varies in each case, and cannot be definitely stated. (*Saunders* v. *Smith*, 3 M. & Cr. 711; *Bohn* v. *Bogue*, 10 Jur. 520; *Chatterton* v. *Cave*, L. R. 10 C. P. 572; 2 Kent's Com. 486.) The editor of legal reports has certainly a copyright in his own marginal notes. In America, it is held that there can be no copyright in the written judgments delivered by a court. It seems to be otherwise in England; but any number of persons may take down, or obtain copies of judgments, and publish them without copying from each other. (*Sweet* v. *Binning*, 24 L. J. 176, C. P.; *Saunders* v. *Smith*, 3 M. & Cr. 711; 2 Kent's Com. 477 *n*; 485 *n*.) So, generally, all may use the same common materials, but one man may not steal the arrangement and combination of materials used by another, nor save himself trouble and expense by simply copying the other's matter; to be a piracy, the one book need not be a copy of the other; it is enough if it is a servile or evasive imitation of the plaintiff's book. (*Emerson* v. *Davies*, 3 Story's Eq. R. 768, an American case of great value; *Longman* v. *Winchester*, 16 Ves. 369; *Matthewson* v. *Stockdale*, 12 Ves. 270; *Lewis* v. *Fullarton*, 12 Beav. 6.) This rule is often applied to such compilations as directories, dictionaries, and guide-books. (*Kelly* v. *Morris*, L. R. 1 Eq. 697; *Scott* v. *Stanford*, L. R. 3 Eq. 718.) Part only of one book may be a piracy of another, and then the publication of such part, or of the whole where the part is not separable, will be restrained. (*Mawman* v. *Tegg*, 2 Russ. 385.) There may thus be a piracy of the illustrations to a book, where they are a substantial part of it, or of a book of designs, or an illustrated catalogue. (*Bradbury* v. *Hotten*, L. R. 8 Exch. 1; *Grace* v. *Newman*, L. R. 19 Eq. 623.) So, the title of a book may be a material part, and the copyright in it will be protected, though another book, issued with the same title, may be quite different in form and contents; but it is no so as to a part of a title, merely descriptive of the nature of a work, as "Directory" "Road book," &c. (*Weldon* v. *Dicks*, 10 Ch. D. 241; *Kelly* v. *Byles*, 13 Ch. D. 682; and see *Dicks* v. *Yates*, 18 Ch. D. 76, where the doctrine in *Weldon* v. *Dicks* was somewhat qualified.) There may be a copyright in a translation, whether made by, or given to, the person publishing it. (*Wyatt* v. *Barnard*, 3 V. & B. 77; 2 Kent's Com. 484.) It seems that, unless expressly provided otherwise, the grant of the copyright in one edition does not preclude the author from publishing a fresh edition before the first is all sold. (*Warne* v. *Routledge*,

L. R. 18 Eq. 497.) Similarly, copyright being the sole and exclusive liberty of printing and otherwise multiplying copies, it also follows that, in the absence of express stipulations to the contrary, a man may, after selling the copyright, continue to sell copies which he had previously printed and retained by him. (*Taylor* v. *Pillow*, L. R. 7 Eq. 418.)

Illustration (*w*) to s. 54.

Illustration (*w*) is an example of an injury or tort by the misuse of another's trade-mark, which for the purposes of s. 54 is to be treated as the object of property, and the proviso in the illustration involves a ground of defence which will be considered in detail under s. 56, clause (*j*), and the illustrations to that clause.

Trade-mark cases.

In the language of the Penal Code (s. 478), a mark used for denoting that goods have been made or manufactured by a particular person, or at a particular time or place, or that they are of a particular quality, is a trade-mark. It has been much questioned in England whether it is accurate to say that there is or is not property in a trade-mark. Most of the cases are only consistent with the view that there is no property in such a mark itself apart from, or except when being applied to, goods of the kind to which it has been appropriated by its inventor; thus, if another applied the same mark to a totally different kind of article, it would be no invasion of the right to use the mark. (*Collins Co.* v. *Brown*, 3 K. & J. 423; see *Leather Co.* v. *American L. Co.*, 4 D. J. & S. 137; S. C. 10 Jur. N. S. 81, and 11 Jur. N. S. 513; *Hall* v. *Barrows*, 4 D. J. & S. 150; *Singer M. Co.* v. *Loog*, 8 App. Cas. 33.) It is quite true that fraud is not the ground of action, for the misuse of another's trade-mark may be innocent. Nor can imposition on the public be the ground of a private action; but then it is the best test of the invasion of the plaintiff's right. And where it has been most distinctly laid down that there is property in a trade-mark, it has been limited to it only as applied to a particular kind of goods, and has been likened to a man's property in copyright, which is using the word "property" in a sense very different from what is meant by it when applied to a house or a watch. (See 11 Jur. N. S. 516.) It may perhaps be regretted that, to avoid all subtle distinctions, the simple rule of the explanation to s. 54 that a trade-mark is property, or rather that there is property in a trade-mark, had not generally been adopted. But the principle

Definition of trade-mark.

Property in a trade-mark.

governing all the cases on this subject certainly is that the injury to the plaintiff arises only when the plaintiff has, by the appropriation of a particular mark or name, fixed in the market where his goods are sold, a conviction that the goods so marked were manufactured by him, and the defendant, by the use of similar marks, induces, or is likely to induce, the public to purchase his goods in the belief that they are those of the plaintiff. (*Singer M. Co.* v. *Loog*, 18 Ch. D. 395; 8 App. Cas. 32, 39; see the leading case on trade-marks, *Croft* v. *Day*, in Tudor's L. C. on Merc. & M. Law.) This is also the principle of the sections of the Penal Code, though there the presence of a fraudulent intention is essential, which it is not to constitute the civil injury. It would probably not be right too rigidly to interpret the explanation to s. 54, so as to carry it farther than what has been just stated, that there must be a mark which has been in fact used by the plaintiff, and such a misuse of it by the defendant as operates as a fraud, whether intentional or not, upon the plaintiff.

There is a great difference between a distinctive name and a descriptive name. The former only can be claimed as a trade-mark, and it must be distinctive as indicating the goods manufactured by one person as distinct from like goods made by another. A person may invent a new article and give it a distinctive name, but if (patents apart) others may make like articles and such come to be known by the descriptive name, the inventor cannot claim to use exclusively the descriptive name given by him as his trade-mark. Others may honestly use the same descriptive name if they do not thereby suggest that the articles were made by the first inventor. (*Leonard and Ellis* v. *Wells*, 26 Ch. D. 288.) But mere length of adverse user will not itself make a mark, which was originally a trade-mark, a mark open to common use, where such user was originally fraudulent, and is still calculated to deceive; but naturally, the burden of proving such fraud and deceit is on the plaintiff, and the burden increases with the length of user. (*In re Heaton's trade-mark*, 27 Ch. D. 570.) A person trading abroad, and there using a trade-mark may be entitled to restrain another from registering that trade-mark in England, though he would not himself be entitled to register it there. (*In re Rivière's trade-mark*, 26 Ch. D. 48.)

What resemblance suffices.

The cases on this subject are almost countless. It follows from the above general principle that to constitute the injury an exact resemblance to the plaintiff's mark is not necessary; and in fact the

resemblance seldom or never is precise, as that might often defeat the defendant's purpose. The question is whether there is such a resemblance as was either intended, or is calculated to deceive ordinary persons, so as to induce them to purchase defendant's goods under the supposition that they are the goods of the plaintiff; and if so, no special damage need be proved. (*Seixo* v. *Provezende*, L. R. 1 Ch. 192; *Cope* v. *Evans*, L. R. 18 Eq. 138; *Siegert* v. *Findlater*, 7 Ch. D. 801; *Braham* v. *Beachim*, 7 Ch. D. 848. *Hendriks* v. *Montagu*, 17 Ch. D. 638.) If there is room to doubt whether the similarity is such as to be calculated to deceive, there should be no temporary injunction, but the question be reserved for decision at the hearing. (*Mitchell* v. *Henry*, 15 Ch. D. 181.) But if the resemblance is calculated to mislead incautious purchasers, that is enough, and an injunction should be granted, although no purchaser has actually been misled; for the very life of a trade-mark depends upon the promptitude with which it is vindicated. (*Johnson* v. *Orr-Ewing*, 7 App. Cas. 219.) It is sufficiently a sale of the goods as being of plaintiff's manufacture, if they are sold by the defendant to dealers to be retailed by them as such, though the dealers knew the truth. (*Sykes* v. *Sykes*, 13 B. & C. 541.)

Other essentials to the injury.

It follows also, from the same general principle, that there can be no suit as for an invasion where the mark, name, or style has never been put forth to the world by the party complaining of the misuser of it. (*Lawson* v. *Bank of London*, 18 C. B. 93; *Brazley* v. *Soares*, 22 Ch. D. 660); nor where the defendant merely represents that he sells, not the plaintiff's goods, but others of as good a quality. (*Canham* v. *Jones*, 2 V. & B. 218); nor where the defendant is otherwise entitled to use the name or mark, and does so without any misrepresentation, such as to induce others to suppose that his business or goods are the same as those of the plaintiff. (*Burgess* v. *Burgess*, 3 D. M. & G. 196; *Hirsch* v. *Jonas*, 3 Ch. D. 584; *Linoleum Co.* v. *Nairn*, 7 Ch. D. 834; *C. S. S. A.* v. *Dean*, 13 Ch. D. 512.) On the other hand, though both parties have the same name, if the plaintiff's name has come to indicate particular goods as his manufacture, defendant must take precautions that his like goods are not mistaken for those of plaintiff; and if there is an actual similarity of description sufficient to mislead the public, and the public is misled to the damage of the plaintiff, he may have an injunction, though the misuser was without any fraudulent intention. (*Millington* v. *Fox*, 3

My. & Cr. 338, distinguished in *Procter* v. *Bayley*, 42 Ch. D. 390; *Singer* v. *Wilson*, 3 App. Cas., 376; *Massam* v. *Thorley*, 14 Ch. D. 748.) And, even without such damage, the plaintiff will be entitled to a perpetual injunction, the appropriate remedy, in addition to any damages in all suits for these torts. (*Cartier* v. *Carlile*, 31 Beav. 292; 8 Jur. N. S. 183; *Edelsten* v. *Edelsten*, 1 D. J. & S. 200; 9 Jur. N. S. 479.) This remedy by injunction will not be barred by mere lapse of time, unless it would be a bar also to the legal right. (*Fullwood* v. *Fullwood*, 9 Ch. D. 176.)

Various forms of a trade-mark.

A trade-mark may be in a great variety of forms. Thus it may be in the shape of a label or wrapper applied to the bottle or packet in which the article is put up. (*Shrimpton* v. *Laigh*, 18 Beav. 164; *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518.) On the same principle, the use, by the defendant, of a similar title to a newspaper, almanac and the like, to that sold, but not being a title merely advertised and not yet used, by the plaintiff, with a view to mislead the public. (*Maxwell* v. *Hogg*, L. R. 2 Ch. 307; *Weldon* v. *Dicks*, 10 Ch. D. 247; *Kelly* v. *Byles*, 13 Ch. D. 682; *Spottiswoode* v. *Clarke*, 2 Ph. 154; *Clement* v. *Maddick*, 33 L. T. 117, Ch.; *Metzler* v. *Wood*, 8 Ch. D. 606); the use of a similar name for an hotel for the like purpose. (*Howard* v. *Henriques*, 3 Sand. 725, American case; and see 2 Story's Eq. 951, *n*; 2 Hilliard on Torts, 68); the use of a similar name or style for a shop, or a firm of merchants, may be restrained by injunction, and damages awarded for any loss occasioned by the wrong. (*Lewis* v. *Langdon*, 7 Sim. 421; *Hookham* v. *Pottage*, L. R. 8 Ch. 91; *Merchant B. Co.* v. *Merchants' Bank*, 9 Ch. D. 560; *Hendriks* v. *Montagu*, 17 Ch. D. 638.) So, a name, whether of a place or a fancy name, may become a trade denomination, and as such the property of a particular person who first gives it to a particular article of manufacture. The use of such name by any other person for the purpose of describing like goods, so that they may be taken to be the article so known as made by the first inventor of the name, will be restrained by injunction. (*Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; *Hirst* v. *Denham*, L. R. 14 Eq. 542.) But to apply to a private house or estate the same name as that used by a neighbour is not a legal injury. (*Day* v. *Brownrigg*, 10 Ch. D. 294.) It is immaterial that the persons constituting the firm have changed, as many firms exist in which there is no one of the name constituting the style; and hence, too, if a trade-mark is

used to indicate the place where goods are made, it may be sold along with the manufactory; but if the value of the goods depends upon the personal skill of the adopter of the mark, he cannot give a right to others to put his mark upon goods made by them, as that would be a fraud. (*Leather C. Co.* v. *American L. C. Co.*, 11 H. L. C. 523; *Hall* v. *Barrows*, 10 Jur. N. S. 55.) On a like principle to that which governs the use of trade-marks, if one man has sold to another the goodwill of his shop—though he may not have agreed to abstain from the trade in future—he will be restrained from so carrying on his business as to induce the public to believe that he is continuing the business of the same shop or firm as he was concerned in before; and he must not solicit old customers, or otherwise try to induce them to deal with him. (*Crutwell* v. *Lye*, 17 Ves. 335; *Churton* v. *Douglas*, 28 L. J. 841, Ch.; *Levy* v. *Walker*, 10 Ch. D. 436; *Leggott* v. *Barrett*, 15 Ch. D. 306; *Ginesi* v. *Cooper*, 14 Ch. D. 596. But see *Pearson* v. *Pearson*, 27 Ch. D. 145.) The reasonableness of the restraint must, of course, be always considered. Sometimes a covenant will only be partly enforced. (*Baines* v. *Geary*, 35 Ch. D. 154.) To enforce such a covenant it must be clear and not vague. (*Davies* v. *Davies*, 36 Ch. D. 359.) In *Mineral, etc., Society* v. *Booth* (36, Ch. D. 465), a covenant in restraint of trade as to the employment of servants was held void. For other instances see *Vernon* v. *Hallan*, (34 Ch. D. 748); *National Provincial Bank* v. *Marshall* (40 Ch. D. 112). The sale of the goodwill and business conveys the right to the use of the old partnership name as a description of the articles sold in that trade, and that right is an exclusive right as against the person who sold it, and an exclusive right as against all the world, so that no other person could represent himself as carrying on the same business. (*Levy* v. *Walker*, 10 Ch. D. 449.)

Sales of goodwill.

Illustration (*x*) is an example of a peculiar class of cases, in which the defendant misuses the name of another person, with a view to his own profit, and with the actual or probable result of causing loss to the other. It has been said that the court can here interfere only in cases of mischief being done to property by the fraudulent misuse of the name of another, as where his profits, or his means of subsistence, or of gaining a livelihood, are thereby diminished. (*Clark*

Illustration (*x*) to s. 54.

Misuse of another's name.

v. *Freeman*, 11 Beav. 112.) The peculiarity of these cases is that the defendant is seeking to turn to his own profit the reputation acquired by the plaintiff in literature, science, or business, by falsely imputing to him that he is concerned in some business, or in the production of some article, which, at the same time, is neither a mere piracy, nor copy of any specific production of the plaintiff, nor intended to be a counterfeit or colourable imitation of any other specific similar production or business, in which the plaintiff is concerned or interested. The most ordinary and not unfrequent example of this kind of injury is that put in illustration (*x*); and indeed it is quite common for promoters of bubble companies thus to misuse the names of others by falsely putting them forward as directors or trustees. The ground for interference stated is the danger of loss thus incurred by the person falsely described as a partner in the business. (*Routh* v. *Webster*, 10 Beav. 561; *Dixon* v. *Holden*, L. R. 7 Eq. 488.)

Examples of the injury.

In one case a publisher advertised for sale certain poems which he falsely represented as the composition of the poet Byron, and he was restrained by an injunction from publishing them. (*Lord Byron* v. *Johnston*, 2 Mer. 29.) In another case, a chemist was selling a medicine which he falsely described by the name of a celebrated physician. But here an injunction was refused on the ground that, though it might be a slander thus to suggest that the plaintiff was interested in the sale of a quack medicine, yet it was not shown that he thereby suffered any loss of property. (*Clark* v. *Freeman*, 11 Beav. 112.) This case, though not overruled, has been much questioned. (See *Maxwell* v. *Hogg*, L. R. 2 Ch. 310; *Springhead Co.* v. *Riley*, L. R. 6 Eq. 561; *Dixon* v. *Holden*, L. R. 7 Eq. 493.*) The truth is, that in these cases the defendant does not really seek to cause any loss or damage to the plaintiff, and it is often difficult to suggest how any real money loss could occur to the plaintiff; the defendant really seeks profit to himself by trading on the plaintiff's reputation, and the true question is whether a man has any property in his own name or reputation. If a man invades by a trespass another's property in land, the owner may have substantial damages,

* It is not accurate that these two latter cases were overruled by *Prudential A. Co.* v. *Knott*, L. R. 10 Ch. 142. Some *obiter dicta* in them, on restraining the publication of a libel, were dissented from; but the cases were not said to have been wrongly decided.

though not a blade of grass is hurt; and it is not easy to suggest why his reputation is not as truly property, or why, to restrain an invasion of it, it should be necessary to show the occurrence or the risk of some actual money loss.

Illustration (*y*) to s. 54.

Illustration (*y*) is an example of a varied class of cases in which the grant of an injunction is really founded on the existence of the ordinary right of property in movables, and not on any right peculiar to the objects in question. Though copyright, properly so called, or the sole and exclusive right of printing or otherwise multiplying copies of any work of literature, or art, or science, does not exist at common law, but only by express enactment, yet the author of such unpublished works is entitled, under the general or common law right of property, to keep them unpublished for his own private use and pleasure alone, or to communicate at will the knowledge thereof to others. Hence, the publication of literary manuscripts, or of notes of lectures or discourses, may be prevented. Hence, also, the publication of purely private letters may be restrained, since the sender of a letter does not, thereby, give the receiver a right to publish it, but, beyond the purposes for which the letter was sent, the property therein remains in the sender. Some curious and interesting cases have occurred in this class of cases.

Nature of the right invaded.

Examples of the injury.

In an early case the publication of a copy of the manuscript of Lord Clarendon's History of the Rebellion was prevented. (*Duke of Queenberry* v. *Shebbeare*, 2 Eden, 329.) In one case a barrister had his precedents of conveyancing stolen out of his chambers, and another had his notes of cases copied by a clerk to the gentleman to whom he had lent them; and in both instances the printing and publishing them was restrained by injunction. (*Webb* v. *Rose*, and *Forrester* v. *Waller*, cited 2 Bro. P. C. 138.) In another case a defendant who had got possession of some copies of etchings by Prince Albert and the Queen, which had been printed for private use only, was restrained from publishing or exhibiting them, or from selling a descriptive catalogue of them. (*Prince Albert* v. *Strange*, 1 M. & G. 25; see also *Turner* v. *Robinson*, 10 Irish Eq. R. 132.) So, it has been held that the owner of photographic portraits was entitled to an injunction to restrain the making and selling reduced copies thereof. (*Mayall*

v. *Higby*, 8 Jur. N. S. 622.) In *Pollard* v. *Photographic Co.* (40 Ch. D. 345) the sale and exhibition of prints of a photograph was restrained, and the plaintiff's right to the negative declared.

In another case where the great surgeon Abernethy was delivering, orally, lectures to medical students, and notes of these were being published in a medical journal, it was laid down that persons who attend lectures or sermons, and take notes, are not to be at liberty to carry into print those notes for their own profit, or for the profit of others. As to students attending oral lectures, there was at least an implied contract that they should be at liberty to take notes only for their own use, and they could not be allowed to print them for others; and third persons, who must have obtained the notes by some breach of duty on the part of a student, could not be allowed to profit thereby. (*Abernethy* v. *Hutchinson*, 3 L. J. 209, Ch.)

This was followed in *Nichols* v. *Pitman* (26 Ch. D. 374), where the lecture was oral, admission being obtained by tickets. The student was held entitled to take notes for his personal use but not to publish them, though so done in short-hand or phonetic spelling. So, the allowing a play to be acted at a public theatre is not a dedication of it to the public at large, so that a person could attend, take short-hand notes, and publish them; and in one case the publication of the copy of a farce, so taken down, was restrained by injunction. (*Macklin* v. *Richardson*, Ambl. 694; 2 Story's Eq. 949, 960.)

Cases of unpublished letters.

There have been several cases of injunctions as to unpublished letters. The doctrine was first established in respect to letters of a literary nature; thus, as to letters written by the poet Pope, an injunction was granted, and the general rule was thus stated: "Another objection has been made, that where a man writes a letter it is in the nature of a gift to the receiver. But I am of opinion that it is only a special property in the receiver, possibly the property of the paper may belong to him; but this does not give a license to any person whatsoever to publish them to the world, for at most the receiver has only a joint property with the writer." (*Pope* v. *Curl*, 2 Atk. 341; see *ante*, p. 58.) Another case was regarding the celebrated letters of Lord Chesterfield to his son; and there the executors of the writer had an injunction against the widow of the son to restrain her from publishing certain portions of the letters. (*Thomson* v. *Stanhope*, Ambl. 736.) The like relief was granted in respect to some

letters written by the poet Burns, at the suit of his children against one who got them from the receiver. (1 Bell's Com. (6th ed.) 553 *n.*)

The doctrine was soon extended to letters of a purely private nature, and in no way literary; and it was laid down that there is no distinction to be found between private letters of one nature, and private letters of another; for that the jurisdiction was founded upon the right of property; and by sending the letter the writer had given, for the purpose of reading, and in some cases of keeping it, a property to the person to whom the letter was addressed, yet the gift was so restrained, that *ultra* the purposes for which the letter was sent, the property was in the sender. So that it is immaterial whether the intended publication is for the purpose of profit or not; if for profit, the party is then selling, if not for profit, he is giving, that a portion of which belongs to the writer. But in such cases, the court does not at all interfere on the score that the publication would be libellous; for the publication of a libel is a crime, and the court has no jurisdiction to prevent the commission of crimes. Nor does it interfere on the ground that the publication would be painful to the feelings of the plaintiff; but it regards only the rights of civil property. (*Gee* v. *Pritchard*, 2 Swan. 402, 413, 415, and 427.) We shall see hereafter how far and why, in our courts in India, there may be an injunction to restrain the publication of a libel, without regard to any invasion thereby of property. (See *infra*, s. 55, Illustration (*e*).)

It is clear that a defendant cannot, on the ground of its being an invasion of the sender's right of property, refuse to produce, in a suit to which they may be relevant, letters written to him by some third person, that being a lawful purpose, and one, therefore, impliedly authorised. (*Hopkinson* v. *Burghley*, L. R. 2 Ch. 447.)

What might justify publication.

It cannot be said to be yet settled whether as a further exception, the publication of letters may be justified by the plea that the same is necessary for the vindication of the defendant's character from some imputation cast upon it by the plaintiff. There might be a case where the acts of the parties would supply reasons for not interfering. (*Percival* v. *Phipps*, 2 V. & B. 19.) On the other hand, it has been well remarked that the protection of private letters is justified by the strongest motives, as preserving social confidence and good faith; and that it would be a serious evil if private persons could publish such letters, upon their own notion of taking the administration of

justice into their own hands, or for the purpose of vindicating their own conduct, or of gratifying their own enmity, or of indulging a gross and diseased public curiosity, by the circulation of private anecdotes, or family secrets, or personal concerns. (2 Story's Eq. 946-8.) Official letters are to be regarded in a somewhat different light; for, from the nature of the public service, or the character of the documents, it may be the right, or even the duty, of the Government, to give them publicity, even against the will of the writers. This is an exception in favour of the Government. It does not follow that any private persons have the same right to publish the same letters or papers, without the sanction of the Government, for their own private profit or advantage. (*Folsom* v. *Marsh*, 2 Story's R. 103.)

Illustration (*z*) to s. 54. Cases of trade secrets, &c. Grounds of the relief.

Illustration (*z*) is an example of a class of cases on the subject of the protection of trade secrets, of secret inventions, and indeed, generally of any other secret knowledge, the disclosure of which will cause pecuniary loss or damage to the owner thereof. There is some discussion in the cases as to the ground upon which the jurisdiction is rested; but I think that it will be found that an injunction has been granted only when the object is to prevent a breach of good faith; a knowledge of the secret having been acquired under such circumstances, that it would be a breach of faith, on the part of the defendant, either to reveal it or to make use of it. At the same time the jurisdiction is not applied merely on the ground of the breach of faith involved, but because it will result in irreparable loss of property to the plaintiff. Thus, it is open to any one to buy a specimen of any secret composition (as a medicine, or anything else not patented), to ascertain, if he can, its ingredients, by analysis or otherwise, and then to manufacture and sell as much of it as he likes, taking care, of course, not to suggest that it is the other man's manufacture. And in such a case, after the death of the original discoverer, he may make and sell the compound, describing it by the name of the discoverer, provided he does not lead the public to suppose that his preparation is the manufacture of the successors in business of the original discoverer; but he must not assert that his is the only genuine article, or suggest that the article manufactured by the successors of the original discoverer is spurious. (*James* v. *James*, L. R. 13 Eq. 421.) There must, in these cases, to justify interference, be present both breach of faith and pecuniary damage. Thus in

Illustration (*z*), the assistant is clearly acting in breach of faith towards his employer, with the certain result of causing him irreparable loss. So it has been in all the cases. Thus, where defendant had been a servant of plaintiff, and had surreptitiously got access to his book of recipes, and had copied them, he was restrained, (*Yovatt* v. *Winyard*, 1 J. & W. 394.) So, where on the marriage of the mother, the benefit and use of a secret recipe was given to her for life, and was afterwards to be sold for the benefit of all the children, and the mother having communicated the secret to the eldest son, and then destroyed the recipe, the son was declared a trustee of it, and enjoined from using it save for the joint benefit of all the children. (*Green* v. *Folgham*, 1 S. & S. 398.) In another case, an injunction was granted to restrain the use of a secret in the compounding of a medicine, not being the subject of a patent, and to restrain the sale of such medicine by a defendant, who acquired the knowledge of the secret in violation of the contract of the party by whom it was communicated, and through a breach of trust and confidence. For, though a plaintiff, not being a patentee, has not a title to an exclusive manufacture and sale against all the world, he may have a title to protection against a particular defendant. (*Morison* v. *Moat*, 9 Hare, 241.) But where the knowledge of the secret has not been acquired by any breach of confidence or good faith, but the injunction which is sought to restrain the divulging of it, would, in effect, be to decree a specific performance of some agreement between the parties as to the employment of the secret invention, an injunction should, it has been said, be refused; for the court cannot judge as to the nature of the agreement till it knows the secret, and then the injunction would be of no value, as there is no right to an exclusive manufacture except by virtue of a patent; and a patentee is protected, as he is a purchaser from the public, and bound so to communicate his secret, as that the public, at the expiration of the period of the patent, may be able to use it; so that, on general principles, the court does not struggle to protect such secret inventions. (*Williams* v. *Williams*, 3 Mer. 157; *Newberry* v. *James*, 2 Mer. 446.) In a case between client and solicitor, a motion for an injunction to restrain a solicitor from disclosing his knowledge was ordered to be heard in private, as otherwise the object of the injunction would be lost. (*Mellor* v. *Thomson*, 31 Ch. D. 55.)

Examples of the injury.

I have already (*ante*, p. 361) noticed the similarity between these cases and those of which Illustrations (*h*) and (*i*) are examples. There is this shade of distinction between the two sets of cases that there the existence of the fiduciary relation and the violation of its duties is the sole essential ingredient to ground the relief, and it is immaterial whether the breach of obligation does or does not result in pecuniary damage, or the invasion of the rights of property; but here such a result is an essential ingredient. It may be useful, here, by way of contrast, to mention those cases more fully than was done before. In one case where A, a solicitor, had been employed by B to negotiate and conclude an agreement on her behalf, and disputes afterwards arose between A and B, and then on a suit being instituted by C against B to set aside the agreement, in which A and D (his partner) were solicitors for C, A and D were restrained from acting as such, and A was further restrained from communicating to C knowledge regarding the agreement acquired by him as solicitor for B. (*Davis* v. *Clough*, 8 Sim. 262; *Lewis* v. *Smith*, 1 M. & G. 417; *Little* v. *Kingswood C. Co.*, 20 Ch. D. 733.) So, where plaintiffs were solicitors, and for many years had employed defendant as an accountant, and as such had entrusted him with various books and papers belonging to them and their clients; and, on a dispute arising, defendant threatened to make use of the information he had thus acquired, he was restrained by an injunction from communicating any particulars regarding the affairs of the plaintiffs, or their clients, and from taking or retaining any copies or extracts from such books or papers. (*Evitt* v. *Price*, 1 Sim. 483.) There is also a *dictum* in one case, that any clerk in a merchant's house may be restrained from surreptitiously availing himself of, or from communicating to others, information acquired by him in the course of his employment, and that a third person, having so acquired information, may be in like manner restrained. (*Tipping* v. *Clarke*, 2 Hare, 393.) The case here suggested I should prefer to class in the other set of cases of which Illustration (*z*) is an example, as there is no fiduciary relation, properly so called; and without special damage, or risk of it, I doubt if there would be any right of action, that is, any legal injury. It would probably be the same as to a banker divulging the state of his customer's account. (*Hardy* v. *Veasey*, L. R. 3 Exch. 107.)

Illustration (*z*) distinguished from Illustrations (*h*) and (*i*).

Cases stated by way of contrast.

But even as to solicitors, there must, it seems, be some special circumstance justifying intervention; thus, where there was litigation between the legatees under a will and the sole managing executor, and he, as such executor, had employed a solicitor, and the executor sought to restrain the solicitor from acting for the legatees in a suit relating to their claims under the will, an injunction was refused. Here the solicitor had substantially been employed on behalf of all parties interested under the will, and though he might have been restrained from divulging the knowledge he had thus acquired in aid of one claiming against the will, there had not been any such change of relation here. (*Parratt* v. *Parratt*, 2 D. & S. 258; the judgment is brief, and not very distinct.) Much more, where one has served as clerk to a solicitor, and then enters into practice himself, in order to restrain him from acting as solicitor for parties against whom his master was employed, it is not sufficient to allege generally, that he acquired, as clerk, information as to the client's affairs; for this would be to close up to the clerk many sources of employment; but it must be shown that he is possessed of some special and particular information, which it would be a breach of good faith for him to carry into the service of the opposite party. (*Bricheno* v. *Thorp*, Jac. 300.) This last case well illustrates the shades of distinction suggested between the two sets of cases.

Mandatory injunctions.

55. When, to prevent the breach of an obligation it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may, in its discretion, grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

Illustrations.

(*a*.) A, by new buildings, obstructs lights to the access and use of which B has acquired a right under the Indian Limitation Act, Part IV. B may obtain an injunction, not only to restrain A from going on with the buildings, but also to pull down so much of them as obstructs B's lights.

(*b*.) A builds a house with eaves projecting over B's land. B may sue for an injunction to pull down so much of the eaves as so project.

(*c*.) In the case put as Illustration (*i*) to s. 54, the Court may also order all written communications made by B, a patient, to A as medical adviser, to be destroyed.

(*d.*) In the case put as Illustration (*y*) to s. 54, the Court may also order A's letters to be destroyed.

(*e.*) A threatens to publish statements concerning B which would be punishable under Chapter XXI of the Indian Penal Code. The Court may grant an injunction, to restrain the publication, even though it may be shown not to be injurious to B's property.

(*f.*) A, being B's medical adviser, threatens to publish B's written communications with him, showing that B has led an immoral life. B may obtain an injunction to restrain the publication.

(*g.*) In the cases put as Illustrations (*v*) and (*w*) to s. 54, and as Illustrations (*c*) and (*f*) to this section, the Court may also order the copies produced by piracy, and the trade-marks, statements and communications, therein respectively mentioned, to be given up or destroyed.

Nature of the relief.

It seems to have been thought prudent to frame a special section with reference to this particular kind of injunction; but it is obvious that it is one applicable to the breach of any obligation, whether arising out of contract or otherwise; and it may be either perpetual or temporary, though perhaps it is, from its very nature, the one form of injunction as to which there is most hesitation in granting temporarily; but there are some cases (as we shall see) in which such relief is indispensable. It is singular with how much doubt this form of injunction was established. An injunction, speaking accurately, may be as properly by way of command as of prohibition; and though injunctions were derived from the interdicts of the Roman law, and that term is now, at least, limited to prohibition, yet interdicts were as often restitutory as prohibitory. In form a mandatory injunction is still prohibitory, but then that is generally the more convenient form.

Examples of such in cases of contract.

In this class of injunctions an early case arising out of contract was where the plaintiff had a lease from the defendant for the purpose of erecting mills, and the defendant was bound to supply water thereto from canals and reservoirs on his own lands; and the plaintiff prayed that the defendant might be ordered to restore a certain cut and stop-gate, to repair certain works, and remove certain locks made since the lease. Lord Eldon, not without some doubt, ultimately restrained defendant from impeding the enjoyment of the water by the plaintiff, by keeping the works out of repair, by the use of locks, or by continuing the removal of the stop-gate. This order, it will be observed, though in form prohibitory, was in substance one

that compelled defendant to do certain acts. (*Lane* v. *Newdigate*, 10 Ves. 192.) This was a case between the original parties to the contract; but the doctrine as to what covenants affect successors in title to land must here be borne in mind. It has been recently decided that the doctrine of *Tulk* v. *Moxhay* (2 Phil. 774 ; *ante*, pp. 191, 343) is confined to restrictive covenants, and will not be extended to affirmative covenants. (*Haywood* v. *Brunswick B. Co.*, 8 Q. B. D. 403 ; *London & S.-W. Ry. Co.*, v. *Gomm*, 20 Ch. D. 562.) The covenant in *Tulk* v. *Moxhay* was affirmative in its terms, but the injunction was not in fact, nor intended to be, mandatory; but it was simply prohibitory of the breach of the negative covenant implied from the one expressed, and so the case is an instance of a restrictive covenant. The doctrine of *Tulk* v. *Moxhay* may be viewed either as an extension in equity of the doctrine of *Spencer's case* (*ante*, p. 182), or an extension in equity of the doctrine of negative easements ; of the two I should prefer to view it as the former. It is in England an equitable doctrine, establishing an exception to the rules at law which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land, or on analogy to an easement. The qualification that to affect a purchaser of the legal estate for value, he must have taken with notice, was required in England merely to avoid the effect of the legal estate; but if the purchaser took only an equitable estate, he took subject to the burden of the covenant, whether he had notice or not. (*London & S.-W. Ry. Co.* v. *Gomm*, 20 Ch. D. 583.) This consideration should make *Tulk* v. *Moxhay* all the more useful as a guide in practice in India. But it is clearly one thing to enforce, by a prohibitory injunction, a purely restrictive covenant, and quite another, by a mandatory injunction, to enforce a covenant to do some act, as, in a case not between landlord and tenant, to maintain buildings in a certain condition; and much more, an affirmative covenant that creates a future interest in the land which is void under the rule against perpetuities, ought not to be enforced either by injunction or otherwise. As to the form of injunction in respect to restrictive covenants see *Parker* v. *Parker* v. *First Avenue Hotel Co.*, 24 Ch. D. 286.

Limitation to restrictive covenants.

In another case the injunction not only restrained the erection of buildings on ground agreed to be laid out as a garden, but also restrained the defendants from permitting the part of the buildings

already erected from remaining thereon until further order; in other words, compelled them to remove the buildings. (*Rankin* v. *Huskison*, 4, Sim. 13.) Not only would a perpetual injunction be very proper in such a case, but where the continuance of the building partly erected, even for a short time, was clearly injurious, as where it was dangerous to the health or person, or made adjoining premises uninhabitable, or incapable of being enjoyed for their special purpose, a temporary injunction to this effect might be indispensable. On this ground of obvious annoyance and injury to the plaintiffs, where the defendant had obstructed the passage of smoke from flues used by the plaintiffs for several years, but their right to which was doubtful, by placing tiles on the top of the chimney-pots, a mandatory injunction was granted to compel him to remove the tiles. (*Harvey* v. *James*, 1 K. & J. 389.) So, where in a conflict between two rival railway companies, one of them had erected an obstruction across a way to the other's station, this was treated as one of those summary and high-handed acts, working irreparable mischief to the traffic of the plaintiff that justified immediate interference before the question of right was heard and decided. (*L. & N.-W. Ry. Co.* v. *L. & Y. Ry. Co.*, L. R. 4 Eq. 174.)

Where there may be a temporary injunction of this kind.

In other cases arising out of contract, perpetual injunctions of this kind have been frequently granted. Thus, where the plaintiffs were, under an agreement, entitled to a stream of water flowing in a certain direction, and the defendant had diverted the stream, he was restrained from so doing; and again, the tenant of a coal mine was thus restrained from permitting a communication with an adjoining mine to continue open, and water to flow through the same; the effect intended being to compel the defendant to close the communication. (*Duke of Devonshire* v. *Eglin*, 20 L. J. 495 Ch., 14 Beav. 530; *Earl of Mexborough* v. *Bower*, 7 Beav. 127.)

Cases of perpetual injunction of this kind.

The limit of the application of such an injunction is well shown in one case, where the defendant was tenant for a term of years of an inn, and was not only removing the fixtures but was also proceeding to close the house and cease to use it as a public inn, and the plaintiff prayed for an injunction to restrain the defendant from (among other things) discontinuing, during the term of the lease, to use and keep

Limit of their application.

open at all reasonable times the house as an inn or public-house, or to take out or renew the proper licenses for that purpose; but the injunction was so far refused, the Vice-Chancellor observing: "It certainly does not appear to me that the court has any jurisdiction to compel a party to carry on the business of an inn, although it may prevent a defendant from doing such acts as would put it out of his power, or out of the power of another person, to carry it on." (*Hooper* v. *Broderick*, 9 L. J. Ch. N. S. 321.) So that where premises are adapted to a particular trade, and leased for a term for that purpose, the tenant cannot be compelled to continue the trade, though he may have covenanted to do so; but he may be restrained from doing what would prevent such a trade being, at any time, carried on upon those premises. This leaves it still open to the landlord to recover substantial damages for the discontinuance of the trade, as where the goodwill of a concern (which renders the lease of the premises more valuable) may be injured by the discontinuance.

Mandatory injunctions in cases of tort.

In cases of tort this kind of injunction is of frequent application; thus, in the case of acts done which prevent the enjoyment of a right to a stream of water, or to the passage of light and air, as in Illustration (*a*), or which constitute a continuous nuisance to land, as in Illustration (*b*). (*Robinson* v. *Lord Byron*, 1 Bro. C. C. 588; *Fay* v. *Prentice*, 1 C. B. 828; *Holmes* v. *Upton*, L. R. 9 Ch. 214 *n.*) It is obvious that in such cases as these an injunction compelling the defendant to undo the injurious acts is the only adequate relief. Where the defendant, despite repeated warnings from the plaintiff, had persisted in building over a court-yard, over which plaintiff had a right of way to his shop, and had refused terms of compensation which plaintiff had agreed to accept, a mandatory injunction was issued to remove the building, though built at an enormous cost. (*Krehl* v. *Burrell*, 7 Ch. D. 551; 11 Ch. D. 146.) This case was considered in *Holland* v. *Worley* (26 Ch. D. 578), but damages were given in lieu of an injunction.

Generally, the relief will be given as to buildings erected after the commencement of the action, or after notice given to the defendant that his doing so is objected to. (*Smith* v. *Day*, 13 Ch. D. 651.) But though there is no rule which prevents the court from granting a mandatory injunction where the injury sought to be restrained has been completed before the filing of the suit, and though there is

no difference in this respect between injury to easements and other rights; yet, especially where compensation is possible, or there has been undue delay, the court will only grant such an injunction to prevent extreme or very serious injury. (*Durell* v. *Pritchard*, L. R. 1 Ch. 244; *Gaskins* v. *Ball*, 13 Ch. D. 329; *Alderley* v. *Shrewsbury*, L. R. 19 Eq. 616.)

So where some other arrangement may be preferred, more for the benefit of the party. Thus where a town corporation had built upon land which ought to have been left open, and A sued on behalf of the other inhabitants to prevent the building, but meanwhile they had been completed, and the Corporation offered to dedicate another piece of open ground in lieu of that built upon, the mandatory injunction was on this account refused to be enforced, as it was an arrangement more for the benefit of all concerned; though in case of a private dispute it would have been otherwise. (*Grahame* v. *Swan*, 7 App. Cases, 547.) So, one local board has no more right to drain into the sewers of another local board than one private person has against another to drain at all or increase existing drainage. And therefore where a board claimed a right to go and increase their drainage into the sewers of another local board they were restrained by injunction from in future exercising such wrongly claimed right; but partly on the ground of delay and partly on the ground of inconvenience and a doubt as to whether the defendant board could stop drainage already allowed into their sewers a mandatory injunction to stop up all sewers, opened beyond their former right, was refused. Private persons who had drained their houses into such new sewers would have been greatly damaged, and it was doubtful if such drainage could lawfully have been stopped. (*Attorney-General* v. *Acton Local Board*, 22 Ch. D. 221, Fry, J.) In another case, with reference to this, the distinction was taken that, where there is a contract, the court cannot attach the same importance to the question whether the damage is serious or not, as it does in mere cases of nuisance, but that the main point is whether the contract has been broken. (*Attorney-General* v. *Mid-Kent Ry. Co.*, L. R. 3 Ch. 104.) But nothing really turns on the form of the injunction, for the same principles as are laid down in s. 54 and elsewhere, to regulate the grant of an ordinary injunction, must, of course, be applied in granting a mandatory injunction; and this was the real distinction between the two sets of cases last cited—in the one an injunction was the only adequate

relief, but in the other damages were not only an adequate, but the more reasonable, remedy. As a general rule, it is only in very exceptional cases indeed that damages will be given in lieu of a mandatory injunction to remove buildings which obstruct light or air; as otherwise this would be compelling plaintiff, in effect, to submit to a compulsory sale of his rights of property. One point not to be lost sight of, when the court comes to consider the reasonable means of doing justice between the parties, is any delay in complaining after plaintiff has been given by defendant full knowledge of his plans, though this delay may fall short of acquiescence. Another is whether plaintiff has not, by negotiating for a specific sum, shown that he would himself regard a money payment as adequete compensation. (*Senior* v. *Pawson*, L. R. 3 Eq. 334.) Though it is true that if the case is, from its nature, not one for interference by injunction, it is also not one for damages; yet the court may choose between relief by mandatory injunction and relief by substantial damages, where though either form of relief is alike open to the court, one may, in the circumstances of the case, be more proper than the other. (*City of London B. Co.* v. *Tennant*, L. R. 9 Ch. 218, 219.) As cases of obstruction to light and air are often spoken of as if they were one and the same, it may be as well to add here that the nature of the case, which would have to be made for an injunction by reason of an obstruction of air, is *toto cœlo* different from the case which has to be made for an injunction in respect of light. It is only in very rare and special cases, involving danger to health, or at least something very nearly approaching it, that the court would be justified in interfering on the ground of diminution of air. (*Ibid*, 221.) In *Baxter* v. *Bower* (44 L. J. Ch. 625) James, L. J., observed that all the forms of injunctions inserted the word air as well as light, but that the former word ought not to be inserted unless specially directed, as the court now never puts in the word "air" unless it is really required. This is due to the fact that in English law, light, as an easement, can now only be acquired under the Prescription Act (at least so it is thought), but air, as an easement, is acquired by common law. (Goddard on Easements, p. 285.)

Illustrations (*c*), (*d*) and (*g*) to s. 55.

Illustrations (*c*), (*d*) and (*g*) incidentally confirm this view, as they show that an ordinary injunction may also be in part mandatory, and, of course, in the cases put in Illustrations (*c*) and (*d*) the order might be that the letters should be delivered up, as well as that they should

be destroyed. This kind of mandatory addition to an injunction is very common in English cases.

Illustrations (*e*) and (*f*) to s. 55.

Illustrations (*e*) and (*f*) remain to be noticed: the two cases are very similar, as in Illustration (*f*), A really threatens to commit defamation of B's reputation, though there is here the further ingredient that to do what he threatens would also be a breach of duty arising out of the fiduciary relation of A to B. The principle exemplified by Illustration (*e*) differs somewhat from that acted upon by English courts. The result of the later cases there seems to be that the court will interfere by an injunction to prevent acts though they may amount to a crime, or to restrain the publication of defamatory statements, though not ascertained by a verdict to be a libel, provided they either have produced or are calculated to produce injury to property; it being the protection of rights of property that justifies the interference, without regard to whether the facts or statements also constitute an offence. (*Thorley* v. *Massam*, 14 Ch. D. 784; *Thomas* v. *Williams*, 14 Ch. D. 864; *Saxby* v. *Easterbrook*, 3 C. P. D., 339; *Prudential A. Co.* v. *Knott*, L. R. 10 Ch. 142; *Springhead S. Co.* v. *Riley*, L. R. 6 Eq. 560.) Illustration (*e*) expressly provides that the publication of a libel by A may be restrained, though it may be shown not to be injurious to B's property. But this discrepancy in principle is more apparent than real; and the difference in the rule is due rather to the difference in the constitution of our courts in India; for our courts having complete jurisdiction over all kinds of civil injuries for which there may be a suit for damages, they may, in the case of a libel, though it relates, not to property, but to personal character only, award damages for any libellous publication, and at the same time grant an injunction to prevent the continued publication of such libel; and hence, as an injunction may be sought as a purely preventive relief, it follows that our courts, before the publication of such libel as above, and when it is only threatened, may grant an injunction to prevent its publication. It may be as well to point out that the injunction supposed to be granted in Illustration (*e*) or (*f*) will not be mandatory either in form or in substance, but prohibitory only. The two illustrations are probably introduced here, because of the use made of them afterwards in Illustration (*g*); but strictly they should have been placed among the illustrations to s. 54. Though there may be a temporary injunction to restrain the

publication of a libel, yet to justify such the statement must be shown by the plaintiff to be untrue, and if it is *primâ facie* a privileged statement, the plaintiff must also show express malice, a matter not conveniently tried on an interlocutory application. Where a shareholder of a company issued a circular to other shareholders, imputing fraud in getting up the company, and proposing certain steps to be taken, as the case was not shown by the plaintiff to be false or malicious, and there being no further mischief to be prevented as the circular had already been sent to all the shareholders, and there was no intention to send it elsewhere, a temporary injunction granted in the court below was dissolved on appeal. (*Quartz Hill, &c., Co.* v. *Beall*, 20 Ch. D. 501.)

But where a member of a friendly society issued to persons, not members of the society, circulars containing inaccurate statements as to the financial condition of the society under circumstances which constituted the circulars a libel, it was held that such circulars ought to be restrained by injunction. (*Hill* v. *Hart-Davies*, 21 Ch. D. 798.) The sending of libellous post-cards will be restrained by injunction. (*Tozier* v. *Hawkins*, 15 Q. B. D. 650.) So an injunction will be granted to restrain a libel on a trade by giving a misstatement of a prior judgment. (*Hayward* v. *Hayward*, 34 Ch. D. 198.) An injunction will be granted to restrain slanderous oral statements injurious to plaintiff's business being made as well as written ones, though as to such, greater caution is of course needed. A mandatory injunction was granted to compel defendant to withdraw a notice given by him to the post-office as to sending to him certain letters to a new address which related to plaintiff's business, whose agent he had been. (*Loog* v. *Bean*, 26 Ch. D. 306.) The principles that govern the issue of an injunction to restrain the publication of a trade libel will be found fully discussed in *Liverpool H. S. Association* v. *Smith* (37 Ch. D. 170).

Injunction when refused.

56. An injunction cannot be granted—

(*a*) to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings ;

(*b*) to stay proceedings in a Court not subordinate to that from which the injunction is sought ;

(*c*) to restrain persons from applying to any legislative body ;

(*d*) to interfere with the public duties of any department of the Government of India or the Local Government, or with the sovereign acts of a Foreign Government ;

(*e*) to stay proceedings in any criminal matter ;

(*f*) to prevent the breach of a contract the performance of which would not be specifically enforced ;

(*g*) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance ;

(*h*) to prevent a continuing breach in which the applicant has acquiesced ;

(*i*) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust ;

(*j*) when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court ;

(*k*) where the applicant has no personal interest in the matter.

Illustrations.

(*a.*) A seeks an injunction to restrain his partner, B, from receiving the partnership debts and effects. It appears that A had improperly possessed himself of the books of the firm and refused B access to them. The Court will refuse the injunction.

(*b.*) A manufactures and sells crucibles, designating them as "patent plumbago crucibles," though, in fact, they have never been patented. B pirates the designation. A cannot obtain an injunction to restrain the piracy.

(*c.*) A sells an article called "Mexican Balm," stating that it is compounded of divers rare essences, and has sovereign medicinal qualities. B commences to sell a similar article to which he gives a name and description such as to lead people into the belief that they are buying A's Mexican Balm. A sues B for an injunction to restrain the sale. B shows that

A's Mexican Balm consists of nothing but scented hog's lard. A's use of his description is not an honest one, and he cannot obtain an injunction.

We come now to the subject of defences to a suit for an injunction.

Defences in suits for an injunction.

The grounds of defence specified in this section may be divided into two classes: (1) *general* grounds of defence applicable alike to all suits for an injunction; these are specified in clauses (*a*) to (*c*); (2) *particular* grounds of defence applicable to the circumstances of special cases; these are to be found in clauses (*f*) to (*k*).

General defences. Clauses (*a*), (*b*) and (*e*).

In the first class, clauses (*a*), (*b*) and (*e*) are necessarily consequent upon, or justified by the constitution of our courts in India; but their enunciation is not therefore superfluous. The Courts of Chancery in England soon learnt to make abundant use of injunctions as a means for controlling proceedings in other courts which were in theory perfectly independent of them; and this they did, not by any order addressed to such courts, nor by the assumption of any power to control them, but through that fundamental principle of their own jurisdiction of acting *in personam*, and so compelling parties to suits before them, under the penalty of attachment and imprisonment for contempt, to regulate their proceedings in other courts in accordance with what the Court of Chancery conceived to be the dictates of equity and good conscience in the particular case. It is not surprising that this very effective contrivance for controlling proceedings elsewhere, excited the bitter animosity of the other courts; but a candid student of the details of its operation must admit that the jurisdiction thus exercised however highhanded in appearance, was not only extremely beneficial, but well-nigh indispensable. (2 Story's Eq. 874 to 893; *Earl of Oxford's case*, 2 L. C. in Eq. 590.) The recent amalgamation of all the courts in one High Court, whereby each becomes a court of equity as well as of law, renders such jurisdiction obsolete; but it was not a useless precaution to prevent in our courts the use of any such jurisdiction. The single exception allowed, where the object is to prevent a multiplicity of suits, has been already noticed under s. 54, clause (*e*) and Illustration (*p*).

Clauses (*c*) and (*d*) rest upon higher considerations of public policy as to which not much need be said. As to clause (*c*) I may remark that, in a somewhat recent case, the Court of Chancery anxiously asserted that there

Clauses (*c*) and (*d*).

could be no doubt that the court had jurisdiction to prevent an application from being made to Parliament, in any case where the rights were simply private ones between the parties. But it declined in that particular case (where the plaintiff sought for an injunction to restrain a railway company from applying for an Act of Parliament, which would have operated to annul a contract between plaintiff and the company) to exercise the jurisdiction; and the court admitted that though judges of great eminence had always asserted the jurisdiction, they had all declined to define the occasion which would justify such an interference; and, I may add, had all declined to venture in any instance to exercise the asserted power. (*Steele* v. *N. Metr. Ry. Co.*, L. R. 2 Ch. 237; *Ex. p. Hartridge and Allender*, L. R. 5 Ch. 671.) But they have often gone so far (and our courts may do the same), as to grant an injunction, even at the instance of one dissentient shareholder, restraining the application of the funds of an incorporated company in defraying the expenses of obtaining an Act of Parliament for altering the constitution of the company; but at the same time leaving the shareholders to do so, if they liked, at their own expense. (*Hawkes* v. *E. C. Ry. Co.*, 1 D. M. & G. 737; *Ware* v. *G. J. W. Co.*, 2 R. & M. 470; *L. & C. Ry. Co.* v. *N. W. Ry. Co.*, 2 K. & J. 293; *Bill* v. *Sierra N. Co.*, 1 D. F. & J. 177.)

Clause (*d*).

In respect to interfering with the public duties of any department of Government, clause (*d*) does not mean that an officer of Government is not liable for or may not be restrained from a wrongful act in the shape of a tort, done under the plea of the command of Government; but where the act is, by express enactment or otherwise, one that may legally be done by the department, it is not for any court to criticise or control the exercise by the department of its discretion in performing its duties. Thus, where a department is authorized to take land for military purposes, and in the exercise of its discretion uses part of it as a rifle-range, though thereby a decided nuisance is caused to adjacent buildings, such as would have made an ordinary owner of land liable for such use of it, yet the use by the department being a reasonable use for military purposes, the act is thus one legalized; and the court cannot interfere to say that the department might more conveniently have placed the rifle range elsewhere, and have used this spot for other purposes. So long as the use is *bonâ fide* and not a mere subterfuge, the court has no right to interfere with the public

duties of the department by giving any directions. (*Hawley* v. *Steele*, 6 Ch. D. 528.) So, no court of municipal jurisdiction has any right to interfere with the acts, or with the public property, of a foreign sovereign. This is not only because there is no jurisdiction as against the individual, but there is no jurisdiction against the foreign country whose property the things are. Thus, articles made in Germany were brought to England, where they were stopped as alleged infringements of an English patent; but the court, holding that there is property in articles though they may be infringements of a patent, refused to interfere as the articles were shown to be the public property of the Mikado of Japan, and he was allowed to remove them. (*Vavaseur* v. *Krupp*, 9 Ch. D. 351.)

Clause (*e*).

With regard to clause (*e*), it used to be thought in England that, where the plaintiff in equity was also taking criminal proceedings on the same subject-matter, he might be made to elect as to which of the two he would prosecute. But it may very well be that a plaintiff, whilst justly seeking relief by civil proceedings in respect to loss occasioned by fraud or conspiracy, may at the same time take criminal proceedings to punish the parties for the offence involved by their acts. (*Saull* v. *Browne*, L. R. 10 Ch. 64.) Much more would it be improper to restrain a defendant by injunction from setting in motion a magistrate to enforce a penalty against the plaintiff, or to compel him to remove a building, or to do any other act in respect to which the magistrate has jurisdiction to decide. (*Kerr* v. *Corp. Preston*, 6 Ch. D. 466.)

Particular defences.

As to the grounds of defence in particular cases, it will be convenient to take the clauses in order.

Clause (*f*).

Clause (*f*) is a necessary deduction from the general principle laid down in s. 54 that, in respect to an obligation arising from contract, the grant of an injunction is to be governed by the rules and provisions as to the grant of specific performance; as it, therefore, follows that whatever is a defence to a suit for specific performance, is a defence to a like suit for an injunction. Such defences have been already considered.

Clause (*g*).

Clause (*g*) will be more especially applicable where the question is whether a temporary injunction ought to be granted, but it may also have to be applied in regard to a perpetual injunction. The clause in substance is the

principle on which courts of equity acted when they refused to grant an injunction, and retained the suit until the question of nuisance or not had been tried and determined by the verdict of a jury. *Atty.-Gen.* v. *U. K. E. Telegraph Co.*, 8 Jur. N. S. 583.) An illustration is *Haines* v. *Taylor* (10 Beav. 75; see also *Radcliffe* v. *Portland*, 8 Jur. N. S. 1007), where an injunction to restrain the erection of gas works in the vicinity of the plaintiff's residence was refused, it being uncertain whether, upon the completion of the works the manufacture of gas would prove a nuisance. In another case where the question was as to the erection of a steam engine, the considerations governing these cases were thus stated: "If indeed this be a work which not only gives the power of doing mischief, but cannot be used, or can hardly in the common course of things be used, without working mischief; if, in short, it be a thing which can scarcely be used without being abused, the case comes to be very different. For in matters of this description, the law cannot make over-nice distinctions, and refuse the relief merely because there is a bare possibility that the evil may be avoided. Proceeding upon practical views of human affairs, the law will guard against risks which are so imminent that no prudent person would incur them, although they do not amount to absolute certainty of damage. I say it will go further, according to the same practical and rational view, and balancing the magnitude of the evil against the chances of its occurrence, it will even provide against a somewhat less imminent probability in cases where the mischief, should it be done, would be vast and overwhelming." And again: "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief without waiting for the result of a trial. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, the court will refuse to interfere till the matter has been tried at law. The soundness of that discretion seems undeniable, which would be very slow to interfere where the thing to be stopped may, very possibly, be prejudicial to none. The great fitness of pausing much before we interrupt men in those modes of enjoying or improving their property, which are *primâ facie* harmless, or even praiseworthy, is equally manifest." *Earl of Ripon* v. *Hobart*, 3 M. & K. 169.) These are considerations that may very well guide the court itself; but by way of caution to plaintiffs, I may add that there is something further to be considered by a plaintiff,

and that is, the danger he runs by not being sufficiently prompt where extensive works are being carried out, from which there is a reasonable prospect of nuisance to himself, lest, haply, when he does come for relief, he may find himself, caught in the meshes of the defence of acquiescence propounded in the next clause. (See *Elwell* v. *Crowther*, 31 Beav. 163.)

The passage quoted above from *Earl of Ripon* v. *Hobart*, was cited in *Fletcher* v. *Bealey* (28 Ch. D. 688), where the suit for an injunction was under the circumstances, dismissed but without prejudice to another suit in case of actual injury or more imminent danger. Where a Company is doing certain acts which undoubtedly tend in their nature to interfere with public rights, and so tend to injure the public, the Attorney-General may sue and have an injunction to restrain them, though there is no evidence of actual injury to the public; as where the Company were about to construct a bridge which would interfere with a navigable river. (*Attorney-General* v. *Shrewsbury, etc., Co.*, 21 Ch. D. 752.)

What is acquiescence.

Clause (*h*) is concerned with the defence of acquiescence, a very valuable and much discussed ground of defence, but one calling for special caution in its recognition. This defence is applicable to the breach of an obligation arising either out of contract, or out of tort, but only in either case where the breach is a continuing one. If a party having a right stands by, and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence. (*Leeds* v. *Amherst*, 2 Ph. 123.) Hence, there should be shown to have been knowledge as well of the acts committed as of the rights involved; or, as has been said, the acquiescence must be such as, in the view of the court, would make it a fraud afterwards to insist on the strict legal right. (*Gerrard* v. *O'Reilly*, 3 D. & War. 414, 433; *Rogers* v. *Nowill*, 3 D. M. & G. 614.) In a case in the House of Lords, it was said that mere lapse of time as evidencing acquiescence is not to be measured by any cycle of the heavenly bodies, but must depend upon the circumstances of each particular case. The doctrine will apply, which is to be found in the laws of all civilized nations, that if a man, either by words or conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been

lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct. . . Generally speaking, if a party has an interest to prevent an act being done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice, than he would have had if it had been done by his previous license. (*Per* Lord Campbell, C., in *Cairncross* v. *Lorimer*, 7 Jur. N. S. 149; *De Bussche* v. *Alt*, 8 Ch. D. 314; *ante*, p. 36.)

In *Moulvi A. M.* v. *Srimati, A., etc.* (15 Ind. App. 220) it was held that, under the circumstances, lapse of time, independently of limitation, was evidence of ratification. There, a delay of twenty years after majority before seeking to set aside a conveyance was held to be fatal to the suit.

The following have been said to be the essentials to constitute such acquiescence as will make it fraudulent for a man to set up his legal rights: (1) A must have made a mistake as to his legal rights; (2) he must have laid out money or done some act on the faith of such mistaken belief; (3) B must have known of his own right which is inconsistent with that claimed by A; (4) B must have known of A's mistaken belief as to his (A's) rights; and (5) B must have encouraged A in his outlay or acts, either directly or indirectly, or by not asserting his own right. (*Willmott* v. *Barber*, 15 Ch. D. 96; *Ramsden* v. *Dyson*, L. R. 1 H. L. 129; *Beauchamp*, v. *Winn*, L. R. 6 H. L. 223.) But once an act is committed without such knowledge or assent, a right of action has accrued, and no lapse of time short of the period of limitation, will bar it, though it may be that delay viewed as *laches* may make the court decline a particular form of relief; but even an express promise not to use the legal remedy will not bar such right of action, if it be a mere promise without consideration. (*De Bussche* v. *Alt*, 8 Ch. D. 314.)

Difference where the injunction is temporary.

With respect to delay as evidencing acquiescence, there is a great difference according as the injunction sought is either a temporary or a perpetual one. There may be sufficient to justify a refusal upon an interlocutory application, but to justify a refusal at the hearing there

must be a much stronger case of acquiescence, for at the hearing the court decides upon the rights of the parties, and the dismissal of the suit upon the ground of acquiescence amounts to a decision that a right, which has once existed, is absolutely and forever lost. (*Johnson* v. *Wyatt*, 2 D. J. & S. 18, 25; *Ware* v. *R. C. Co.*, 32 L. T. 136 Ch.; *Bovill* v. *Crate*, L. R. 1 Eq. 388; and *Hogg* v. *Scott*, L. R. 18 Eq. 453.) Delay is material where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving the remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy were to be afterwards asserted. Thus two points are to be regarded: the length of the delay, and the nature of the acts done in the interval. (*Lindsay P. Co.* v. *Hurd*, L. R. 5 P. C. 239; *Erlanger* v. *New S. P. Co.*, 3 App. Cas. 1218.) No doubt in these cases a plaintiff is often in a difficulty in steering clear of charges of precipitancy on the one hand, and acquiescence on the other. (*Elwell* v. *Crowther*, 31 Beav. 163; *Swaine* v. *G. N. Ry. Co.*, 9 Jur. N. S. 1196.)

Breach must be a continuing one.

But acquiescence is of avail as a defence only where the breach is a continuing one. Thus, where the plaintiffs, the owners of Vauxhall Gardens, had stood by whilst their tenant had built, and for above eleven years had kept open a house of entertainment near to the Gardens, the same being in violation of a covenant in the lease, an injunction was refused, as the acquiescence was in a continuing breach, complete and important from its commencement, and at once calling for the active interposition of the landlord in the maintenance of his rights. (*Barret* v. *Blagrave*, 6 Ves. 904.) But where each act, though the same in kind, is distinct and complete in itself, this is not a continuing breach; thus where tenants had a right to cut turf for their own use, but not for sale, the defence to an injunction that the tenants had done this for upwards of 80 years, was rejected, and it was said: "Though by an abuse of their right, these tenants may have used it to an extent not authorized, this can never give them a right against their landlord. For still it is only by his permission, and because the landlord does not think fit to punish every abuse, the tenant shall not by that gain a prescriptive title against his landlord. It would be a fraud to allow him to do so." (*Courtown* v.

Ward, 1 S. & L. 8.) Similarly, where the covenant was not to carry on any trade on the premises, without a license in writing, and during ten years the trades of plumber, greengrocer and corndealer had been carried on, and then the tenant proceeded to put up an oven, and carry on the trade of a baker, an injunction was granted, for the permission of the lessor without writing to carry on one trade, did not amount to a general license for any trade; neither was it for the court to enter into a comparison, and permit the lessee to carry on some trades as less offensive than others. (*Macher* v. *Foundling Hospital*, 1 V. & B. 188; *Richards* v. *Revitt*, 7 Ch. D. 224.)

Acquiescence in a like breach by another.

But the acquiescence of the landlord in the breach of a covenant by one tenant, may, from the nature of the act, amount to a waiver as to other tenants equally affected by a like covenant. Thus where there were several adjoining houses, and the tenants were under a like covenant as to building, and the landlord had allowed some to infringe the convenant, he was refused an injunction to restrain another tenant from a like breach. It was not a question of mere acquiescence; but in every instance in which the grantor suffers grantees materially to deviate from a general plan intended for the benefit of all, he deprives others of the right, which he had given to them, to have the general plan enforced for the benefit of all. The appropriate relief was such damages, if any, as he might deserve (*Roper* v. *Williams*, T. & R. 18; *Peek* v. *Mathews*, L. R. 3 Eq. 515.)

No acquiescence till the injury is complete.

If works likely to become a nuisance are erected, and subsequently carried on without any objection, the owners of the adjoining estates, who acquiesced so long as no perceptible injury was sustained, are not precluded, when injury arises, from objecting to an extension of the works. The distinction is between where the consequences of the act assented to are obvious and plain, and where they at first seem to be, and are, innocuous, but afterwards by addition or otherwise become seriously injurious to others. (*Bankart* v. *Houghton*, 28 L. J. 473 Ch.)

Acquiescence may not bar compensation.

Where the acquiescence, though not sufficiently long to give rise to a prescriptive title in the defendant, has in result led him to incur some substantial outlay, it will generally follow that a perpetual injunction ought to be refused, though at the same time it may very well be that the plaintiff ought not therefore to be left without relief

of any kind, but it may be an equitable adjustment of the rights of all parties, while refusing an injunction, to give the plaintiff such damages as may compensate him for any injury to his property. Thus in *Wood* v. *Sutcliff* (2 Sim. N. S. 163) an injunction was refused, partly on the ground that the plaintiff had stood by while the defendants were constructing their works, and had suffered them to use them during nearly five years, without giving them a hint that they were doing anything that they had not a lawful right to do; and partly on the ground that the damage (the pollution of a stream of water) done to the plaintiff by the defendant's works might be compensated by a money payment. In another case where adjoining mill-owners were entitled to take water from a canal by pipes for one purpose only, but the plaintiffs had encouraged the defendant in constructing his mill, and had acquiesced in his using the water for various purposes, an injunction was on this ground refused to restrain him from using the water for other than the authorized purpose. (*Rochdale Canal Co.* v. *King*, 22 L. J. 604 Ch.)

License or leave when irrevocable.

In disposing of cases of this kind it may be useful to bear in mind one or two general principles applicable to these as well as other cases. Thus, a mere license passes no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful; thus leave by A to B to come on A's land is a mere license, and however given is always revocable. (*Thomas* v. *Sorrel*, Vaugh. 351; *Wood* v. *Leadbitter*, 8 M. & W. 838.) A grant conveys some interest, though it may include a license. Leave from A to B to do something on A's land, as to come and make a watercourse through it, or to have a right of way over it, is a grant, and by English law requires a deed; but by any law, if the grant is good in form and for value,—or, though not so, if the act has been done, and expense incurred in doing it,—then, in equity at least, the leave is irrevocable. (*Devonshire* v. *Elgin*, 14 Beav. 530; *Bunkart* v. *Tennant*, L. R. 10 Eq. 141.) There may be leave from A to B to do something on B's land, the effect of which may be either to create an easement for B's land over A's, or to destroy one for A's land over B's; in neither case does even English law require a grant by deed, and in both, the act once done by B, the leave is irrevocable. (*Winter* v. *Brockwell*, 8 East. 308; *Liggins* v. *Inge*, 7 Bing. 682; see Act V of 1882, s. 52 to s. 64.)

Clause (*i*). This provision is the result of the general principle that an injunction, like specific performance, is an exceptional form of relief intended to supplement the defects of the usual mode of proceeding, and therefore applicable only when the ordinary remedy is either inadequate or not available. The reason for the exception to this general rule in the case of a breach of trust has been explained under s. 54, Illustration (*f*), *ante*, p. 294.)

Clause (*i*).

Clause (*j*). This rule rests on the maxim that he who seeks equity must do equity, and is embodied in the expression used in some cases, that a plaintiff seeking an injunction must come with clean hands. The three illustrations appended to this section are all examples of this clause. Illustration (*a*) is taken from the case of *Littlewood* v. *Caldwell* (11 Price 97), where, as the plaintiff had possessed himself of the books, and refused his partner access to them, this was held to be "such an unwarrantable outrage on the partnership property, as to deprive the plaintiff of any claim to the favour of the court;" and his motion for an injunction was refused, but without prejudice to any future application. In another case it was held that the general rule applies, and a partner, like any other plaintiff, will not obtain the aid of the court, unless his own conduct will bear examination, unless, as it is said, he comes with clean hands; for "it is a principle of the court with respect to partnership concerns, that a partner who complains that the other partners do not do their duty towards him, must be ready at all times, and offer himself, to do his duty towards them." (*Const.* v. *Harris*, T. & R. 523.)

Clause (*j*), its principle. Illustration (*a*) to clause (*j*).

Illustrations (*b*) and (*c*) are both taken from the class of cases on trade-marks. Illustration (*b*) is taken from the case of *Morgan* v. *McAdam* (36 L. J. 228 Ch.) In a similar case the plaintiff was selling a stove, which he falsely described as patent, and an injunction was refused. (*Flavel* v. *Harrison*, 10 Hare, 467.) It was at one time thought that if there had once been a patent which had expired, to continue to use the term "patent" would not be such a misdescription as to justify the refusal of an injunction. (*Edlesten* v. *Vick*, 11 Hare, 78.) But the true rule must now be taken to be as follows. If a trade-mark represents an article as protected by a patent, when in fact it is not so protected, such a statement *primâ facie* amounts to a misrepresentation

Illustration (*b*) to clause (*j*).

of an important fact, which would disentitle the owner of the trade-mark to relief against any one who pirated it. If there had originally been a patent, and the statement in the trade-mark being true when first introduced, had been continued after it had ceased to be true, then if the word "patent" be not so used as to indicate the co-existing protection of a patent, but merely as part of the designation of an article known in the market by that term, it is not a misrepresentation. In such a case nobody is meant to be deceived, or is deceived; a patent may have expired, and be known to have expired, fifty years ago, and yet the name of "patent" may have become attached to the article, and be used in the trade as designating it. But if the trade-mark represent the articles as protected by patent, when in fact it is not so protected, then it can make no difference whether the protection never existed or has ceased to exist. (*Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 543; *Cheavin* v. *Walker*, 5 Ch. D. 862) Further, as to some articles, the term "patent" has come to be a mere term of art, without any allusion to letters patent, as when we speak of "patent leather boots;" and so it might be as to any other article, if from the usage of many years it has come to be so applied, and then its use is no misrepresentation. (*Marshall* v. *Ross*, L. R. 8 Eq. 651.)

Illustration (*e*) to clause (*j*).

Illustration (*e*) is taken from the case of *Perry* v. *Truefitt* (6 Beav. 66); and in a like case where plaintiff sold mixed tea under the name of Howqua's mixture, but in his advertisements he made false statements to the public, as that it was the tea used by Howqua and so on, the court refused to restrain the defendant from selling tea under the same name. (*Pidding* v. *How*, 8 Sim. 477.) But it was held in one case that mere puffing recommendations, though not strictly true, will not suffice to debar the plaintiff. There the plaintiff was the seller of well-known quack medicines, and the defendant sold the like, and closely copied the boxes, pots, labels, and wrappers used by the plaintiff; and though it was urged that the plaintiff falsely pretended that his medicines would cure all the world, and that they were recommended by the faculty, and also falsely described himself as a professor, yet it was held to be a clear case of fraud in which the plaintiff was entitled to protection. (*Holloway* v. *Holloway*, 13 Beav. 209.) Perhaps, though mere puffing recommendations of goods are certainly to be distinguished from utterly false statements regarding

them, this last decision may be doubted, for it seems that as a bar to relief, where there is a misrepresentation, it is immaterial that the misrepresentation is so gross and palpable, that no one is likely to be deceived by it. (*Leather C. Co.* v. *American L. C. Co.*, 11 H. L. C. 523; 10 Jur. N. S. 81.)

Clause (*k*).

Clause (*k*). This is probably intended to apply to such a case as where a shareholder, who had purchased a share in a company simply for the purpose of instituting a suit, was refused an injunction, as it appeared that he was not suing *bonâ fide* to protect the interests of himself and his co-shareholders, but for the purpose of furthering the designs of a rival company, whose puppet he really was, and under whose directions and at whose cost the suit was being carried on. (*Forrest* v. *Manchester S., &c., Ry. Co.*, 7 Jur. N. S. 887.) The true ground here was that the plaintiff had no real personal interest in the matter, as he was only a nominal plaintiff; but apart from this, it is immaterial from what motives a shareholder may, on behalf of himself and the other shareholders, sue the company, provided the suit be not a mere imposition upon the court, but *bonâ fide* with a view to some interest of the shareholders in the company; and the mere purchase of shares in order to be able to sue the company, would not then amount to maintenance, nor debar the plaintiff from relief if he had a real interest to protect. (*Hare* v. *L. & N.-W. Ry. Co.*, 7 Jur. N. S. 1145.)

Injunction to perform negative agreement.

57. Notwithstanding section 56, clause (*f*), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative agreement, shall not preclude it from granting an injunction to perform the negative agreement; provided that the applicant has not failed to perform the contract so far as it is binding on him.

Illustrations.

(*a*.) A contracts to sell to B for Rs. 1,000 the goodwill of a certain business unconnected with business premises, and further agrees not to carry on that

business in Calcutta. B pays A the Rs. 1,000, but A carries on the business in Calcutta. The court cannot compel A to send his customers to B, but B may obtain an injunction restraining A from carrying on the business in Calcutta.

(*b.*) A contracts to sell to B the goodwill of a business. A then sets up a similar business close by B's shop, and solicits his old customers to deal with him. This is contrary to his implied contract, and B may obtain an injunction to restrain A from soliciting the customers, and from doing any act whereby their goodwill may be withdrawn from B.

(*c.*) A contracts with B to sing for twelve months at B's theatre and not to sing in public elsewhere. B cannot obtain specific performance of the contract to sing, but he is entitled to an injunction restraining A from singing at any other place of public entertainment.

(*d.*) B contracts with A that he will serve him faithfully for twelve months as a clerk. A is not entitled to a decree for specific performance of this contract. But he is entitled to an injunction restraining B from serving a rival house as clerk.

(*e.*) A contracts with B that, in consideration of Rs. 1,000 to be paid to him by B on a day fixed, he will not set up a certain business within a specified distance. B fails to pay the money. A cannot be restrained from carrying on the business within the specified distance.

This section embodies the principle which was first fully established in the great case of *Lumley* v. *Wagner* (1 D. M. & G. 604), which, in its facts, was very nearly the same as that given in Illustration (*c*). It is obvious, in the first place, that this section is limited to cases of obligations arising out of contract. It would follow from the general rule laid down in paragraph 2 of s. 54, in respect to such obligations, namely, that the grant of an injunction is to be governed by the rules and provisions of chapter ii of this Act, that where there would be no specific performance, there should also be no injunction. Strictly speaking, then, the insertion of clause (*f*) to s. 56, would have been superfluous if it did not serve conveniently to introduce this exception to the general rule in such cases, in favour of injunctions. One result of *Lumley* v. *Wagner* was to remove all doubt that the lines on which the court acts in granting specific performance and injunctions are not identical.

The leading case.

But it is not so easy as it might seem, to define what cases are, and what are not, within the exception given in this section. If I fail here in precision of language, as my excuse I find one very learned

Difficulty in its application.

judge in a case of this kind saying: "I cannot find any distinct line laid down, or any distinct limit, which I could seize upon and define as being the line dividing the two classes of cases—that is, the class of cases in which the court, feeling that it has not the power to compel specific performance, grants an injunction to restrain the breach by the contracting party of one or more of the stipulations of the contract, and the class of cases in which it refuses to interfere. There is no such distinct line to be found in the authorities." (*Fothergill v. Rowland*, L. R. 17 Eq. 141; to the like effect see 2 Story's Eq. 958 *a*.) In that case there was a contract to raise and deliver, during a term of years, all the coals out of a certain colliery, for the use of certain ironworks, and then the defendant was about to sell the colliery to others. No doubt this was a mere contract for the sale of goods, and the remedy by damages might be an adequate and easy form of relief. In *Donnell* v. *Bennett* (22 Ch. D. 835) A agreed to sell all his refuse fish during two years to B (a manure manufacturer) and not to anyone else, and B agreed to pay A a certain sum for the same. Afterwards A was induced by C to break his contract and to sell all his refuse fish to him. An injunction was granted against A and C to restrain both of them from selling and buying. Fry, J., expressed himself dissatisfied with the law and acted only on the authorities. He said he thought the case not distinguishable from *Fothergill* v. *Rowland or Wolverhampton, etc., Ry Co.* v. *L. & N.-W. Ry. Co.* (*ante*, p. 283), and that the tendency of modern cases was to give damages instead of an injunction when that was an adequate remedy. He thought that *Hills* v. *Croll* had been overruled by *Catt* v. *Tourle*. But on the authority of *Lumley* v. *Wagner* and other like cases he granted the injunction though dissatisfied with the law.

Negative stipulation may be implied.

In *Lumley* v. *Wagner* there was an express negative stipulation that defendant should not act elsewhere, but it was then suggested, and in subsequent precisely similar cases it has been expressly held, that such a negative agreement will be implied, and s. 57 provides accordingly. (*Webster* v. *Dillon*, 3 Jur. N. S. 432; *Montague* v. *Flockton*, L. R. 16 Eq. 189.)

I do not know that I can be more precise than this, that for a case to be within the benefit of s. 57, the contract must comprise, at least impliedly, both an affirmative and a negative stipulations, but that

not every contract, so comprising such stipulations, is, therefore, within the section. Thus, where there was a simply affirmative agreement by a barrister to prepare reports of cases for a certain publisher, an injunction of a negative character was refused on the ground of there being no negative stipulation; though why a covenant not to compose reports for any other person was not here implied, is not so clear. (*Clarke* v. *Price*, 2 Wils. 157.) Indeed, it is not easy to say why a negative stipulation might not always be implied from an express affirmative stipulation.

Some cases examined and compared with *Lumley* v. *Wagner*.

It follows from *Lumley* v. *Wagner* that where the contract is to abstain from doing a certain act, it is no objection to the grant of an injunction for that purpose, that if the contract had been to do the act, the court would have been incapable of compelling the specific performance of the contract. Also that where there are several stipulations by the same party, some affirmative and some negative, relief may be granted in respect of the latter, though none is *asked* for in respect to the former. In *Stuart* v. *Diplock* (43 Ch. D. 343), part of a covenant not to carry on a particular trade in a certain house was enforced. But in *Baker* v. *Hedgecock* (39 Ch. D. 520) when the court came to the conclusion that the agreement in restraint of trade was void for being too general, it was held that the general retraint could not be rejected and effect given to the limited portion of the agreement. Further, where the negative stipulation is merely ancillary to, concurrent and operating together with, the other stipulation by the same party, the right to the relief is clear though the other stipulation cannot be specifically enforced. But where the two stipulations consist of two correlative acts, to be done one by the plaintiff and the other by the defendant, there will be no injunction to restrain a breach of the negative stipulation by the defendant, if the affirmative stipulation by the plaintiff could not be specially enforced, and defendant would, through the injunction, be left without adequate remedy for the breach of it; as where A contracts to supply B with all the goods of a particular kind from his manufactory, and B contracts not to buy any such goods elsewhere. (*Hills* v. *Croll*, 2 Ph. 60; *ante*, p. 128.) This case seems to me thus clearly distinguishable from *Lumley* v. *Wagner*, and to be still good law, though I am aware that it was thought otherwise in *Catt* v. *Tourle* (L. R. 4 Ch. 654), a case which, if rightly

decided, belongs to a different class of cases. As a matter of fact, Selborne, L. C., much doubted the correctness of the decision in this case in *Zetland* v. *Hislop* (7 App. Cas. 447.). But if the two correlative stipulations be both negative, as where A contracts with B that he will act only at theatre H, and B contracts with A that he will write only for theatre H, then either might have an injunction against the other. (*Morris* v. *Colman*, 18 Ves. 437.)

In another case, A agreed to employ B as his agent to sell all his goods of a particular kind, with 40 per cent. discount, and not to employ any other agent for that purpose at more than 25 per cent., and he was restrained by injunction from violating the negative stipulation. Here there was both an affirmative and a negative stipulation on the part of A, and the case was thus like *Lumley* v. *Wagner*, and differed from *Hills* v. *Croll*. (*Dietrichsen* v. *Catburn*, 2 Ph. 52.) The court could not compel A to send goods to B for sale, nor on the other hand could it compel B to sell them at all, or sell them diligently, if A did send them; but then B would be within the proviso to s. 57 and not entitled to the injunction. This comes near to the distinction which has been suggested, that the ground upon which the court goes in enforcing by injunction a negative term in an agreement, the positive terms in which cannot be enforced by a decree for specific performance, is that the injunction is dependent upon the plaintiff's performing his part of the contract, and will be dissolved on his failing to do so; and that the nature of the agreement is such that the court could at any time upon a breach of any other term in the agreement, restore the parties to their former position, or nearly so, by dissolving the injunction. (*Stocker* v. *Wedderburn*, 3 K. & J. 393.) Again, in another case, A and B had been partners as tailors, and A retired in consideration of a sum paid him by B, and agreed not to trade as a tailor within certain limits, and B agreed to employ A as his cutter-out. A was restrained by injunction from so trading within the limits, though the court could not compel B to employ A as a cutter out. (*Rolfe* v. *Rolfe*, 8 Sim. 88.) Here was a negative stipulation on one side, and an affirmative one on the other, and the latter was such as could not be specifically enforced, and so the case was like *Hills* v. *Croll*; but here, unlike that case, A had, notwithstanding the injunction, an adequate remedy by damages against B in case of a breach by him of the affirmative stipulation, for the two stipulations were not correlative, but independent.

Ground of distinction suggested.

It would be a satisfactory ground of the distinction between the two classes of cases, of which *Lumley* v. *Wagner* and *Fothergill* v. *Rowland* are respectively instances, if we might say that, in the latter class, the refusal of an injunction will always leave the plaintiff with an adequate remedy in damages; but not so in the former class, and therefore an injunction is granted as a sort of *cyprès* specific performance of the contract. This distinction will certainly apply to very many of the cases above noticed; and if it does not cover all (and, after the dictum above quoted, I hesitate to say that it will), yet it will often help to a decision as to whether a case is within the benefit of s. 57 or not. Certainly, in *Lumley* v. *Wagner*, the case rested on the peculiar value of the defendant's voice, and the damages could not be well estimated. So, there have been injunctions restraining deviations from contracts in respect to particular ships which may, perhaps, be justified on the ground of the pecular value of the use of the particular ships (*De Mattos* v. *Gibson*, 4 D. & J., 276; *Le Blanch* v. *Granger*, 35 Beav. 187); though perhaps they ought to rest on the ground of notice.

The proviso to the section.

The application of the proviso in s. 57 is well exemplified by the single case put in Illustration (*e*); but there is a case so much like *Lumley* v. *Wagner*, in which it was applied, that I will notice it here. A engaged B, who was a provincial actor, to act at his theatre in London for a certain time; and B came to London and was always ready and willing to act for A, but though A paid B his salary, he kept him idle for five months, and then B engaged himself to act elsewhere. An injunction to restrain him was refused on the ground that the mere payment of B's salary was not a sufficient performance on A's part; for there was a mutuality in the agreement entered into on both sides; on the one side that B should have an opportunity of displaying what his abilities and talents were before a London audience, and on the other side that he should not act elsewhere without the permission of A. (*Fechter* v. *Montgomery*, 33 Beav. 26.)

It remains to notice the other illustrations to s. 57.

Illustrations (*a*) and (*b*) examined and compared.

Illustrations (*a*) and (*b*) are both cases of the sale of the goodwill of a business; they differ in two respects: in Illustration (*a*) the business is not connected with any particular premises, but the seller expressly covenants not to carry on the same business within certain limits

in Illustration (*b*) the business is connected with particular premises, but the seller does not covenant not to carry on the same business. In each case there is an implied covenant; in Illustration (*a*) it is that the seller will send his old customers to the buyer; in Illustration (*b*) it is that the seller will not solicit the old customers to deal with himself. Now where the business is connected with particular premises, the sale of the goodwill of it (apart from any express covenant to the contrary) is nothing more than the sale of the probability that the old customers will still resort to the old place of business. (*Crutwell* v. *Lye*, 17 Ves. 335.) There is no implied covenant that the seller will be active, or in any way exert himself, to send the old customers to the old place of business. But where the business is not so connected with any particular premises, as in the case of a medical man whose business rather lies within certain limits than at any particular spot, the Illustration (*a*) shows that a covenant will be implied that he will direct his old customers to the purchaser of the goodwill of his business. (*May* v. *Thomson*, 20 Ch. D. 705.) I am not aware of any case to this effect, but it is clearly reasonable to imply such a covenant, which is really in accordance with the ordinary usage. The case put in Illustration (*a*) is thus just like *Lumley* v. *Wagner* and those cases, as on A's part there is both an affirmative and a negative stipulation, though here the negative is an express, and the affirmative is an implied one, but the former is enforced though the latter cannot be.

In *Churton* v. *Douglas*, Johns, 174, this was objected to and extended by saying that the goodwill is the probability that the old customers will buy the old goods from the old firm or their successors in business whether the means of identification be the place of business or not. Thus, to the customers of a wholesale business, it is the old business rather than the mere site of it that is important. In the case of "quack" medicines, this is everything. The distinction between "local" personal goodwill is on like grounds objectionable. Another form is to distinguish the goodwill of a trade or business and professional goodwill, as of a doctor or solicitor. (Sebastian, 272.) The goodwill of a professional business, but not that of a trade partnership (*Wedderburn* v. *Wedderburn* 22 Beav. 124), survives to the surviving or continuing partner. (*Arundell* v. *Bell*, 52 L. J. Ch. 537.) In some of the older cases it was doubted whether there could be specific performance of a contract to sell the goodwill of a profession, as in the case of a solicitor. But it is now settled that there may, whether the goodwill be

attached to a place of business or not. (*Llwellyn* v. *Rutherford*, L. R 10 C. P. 456; *In re Kitchin*, 16 Ch. D. 226; *Lery* v. *Walker*, 10 Ch. D. 436; *Stewart* v. *Gladstone*, 10 Ch. D. 626.)

Illustration (*b*).What is implied on sale of a goodwill.

The case put in Illustration (*b*) is the more ordinary one in practice, and it is curious that the limits of the implied covenant as to soliciting has been the subject of quite recent discussion. In cases of this kind, then, the mere sale of the goodwill of a trade imposes no obligation on the vendor to forbear the exercise of the same trade, and therefore an injunction ought not to be granted, unless on the sale there was an express covenant to the contrary. (*Shackle* v. *Baker*, 14 Ves. 468; *Kennedy* v. *Lee*, 3 Mer. 452.) But if so, the court would interpose; as also it would against any such fraud as, after the sale of such goodwill, attempting to set up the same trade in the same place under the same sign or name, the party giving himself out as the same person, or as carrying on the old concern; or where, from the circumstances, it appears that the defendant gave encouragement generating a confidence that he would not engage in such a trade, inducing other persons to involve themselves; on the ground of which conduct, a court of equity might interpose. (*Crutwell* v. *Lye*, 17 Ves. 335.) Hence, as the style or name of the firm is often as effective and distinctive in relation to the goods sold as any other trade-mark,—so much so that many firms exist in which there is not a single member of the individual name expressed in the style of the firm, there may, after the sale of the goodwill, be such a misuse of the old firm's name, though in part it may be the seller's own name, as will be a violation of his implied covenant, and therefore fit to be restrained by an injunction. Thus, where the old firm's name was "John D. & Co.," and defendant, whose own name was John D., sold the goodwill, and then after a time, in connection with others, set up the same business next door under the name of "John D. & Co.," it was held that the old firm's name was an important part of the goodwill sold; that the way defandant was using it was a misrepresentation, and that he was bound to use his own name with a fair representation on his part that his present business was a totally different one, and he was therefore restrained from thus, or in any other manner, holding out that he was carrying on the business in continuation of or in succession to the business carried on by the late firm of "John D. & Co." (*Douglas* v. *Churton*, Joh. 174.) A retiring partner may advertise

his discontinuance to a share in a publication, but he may not advertise *its* discontinuance. (*Bradbury* v. *Dickens*, 27 Beav. 53.) He may say he is "late of" the old firm, but not that he is a "successor" to it. (*Walker* v. *Mottram*, 19 Ch. D. 355.)

Limit of rule as to soliciting.

In regard to soliciting, the restriction seems to be limited to personal solicitation. Thus after the sale of the goodwill, if the defendant sets up the same kind of business as the old one, he is entitled to publish any advertisement he pleases in the papers, stating that he is carrying on such business. He is entitled to publish any circulars to all the world to say that he is carrying on such a business; but he is not entitled, either by private letter or by a visit, or by his traveller or agent, to go to any person who was a customer of the old firm, and solicit him not to continue his business with the old firm, but to transfer it to him, the new firm. That is not a fair and reasonable thing to do after he has sold the goodwill. (*Labouchere* v. *Dawson*, L. R. 13 Eq. 325.) The rule thus stated seems reasonable, and one which the illustration recognises; but the case cited has been much questioned. In England it is clear that the rule is limited to voluntary sales of a goodwill, and the implied obligation not to solicit old customers is a purely personal one. Hence, where the sale is a compulsory one, as in case of insolvency by a man's trustees, the restriction does not apply; and the man on starting again elsewhere in the same business may solicit his old customers, taking care, of course, not to represent that he is carrying on the old business in the old place. (*Walker* v. *Mottram*, 19 Ch. D. 355.) So where, under the provisions of a partnership deed one partner has been expelled and repaid his share of the capital, this is not like a voluntary alienation of the interest, and though he cannot carry on the business as if it was the business of the old firm, he will not be restrained from soliciting the customers of the old firm. (*Dawson* v. *Beeson*, 22 Ch. D. 505 (C. A.).) The case of *Walker* v. *Mottram* was expressly followed in *Pearson* v. *Pearson* (27 Ch. D. 145) and *Labouchere* v. *Dawson* was disapproved of by a majority of the court. But in *Pearson* v. *Pearson* there was also a stipulation in the agreement which, it was held, ought to put the case outside of *Labouchere* v. *Dawson*. Where a receiver and manager, not previously engaged in business, had carried on a business for ten years under the order of the court, and afterwards, proposals were made for a purchase of the business under the order of the court by another

firm, the court refused to restrain the manager and receiver from soliciting orders from or doing business with the present customers. But it must be remarked that in this case no restriction was imposed on or obligation entered into by the receiver and manager as to his carrying on a similar business. (*Irish* v. *Irish*, 40. Ch. D. 49.)

Temporary injunction in such cases.

With regard to temporary injunctions in such cases, there is a good caution that, on the one hand, if the court does not interpose, the plaintiff often cannot possibly have what he really intended to purchase; and, on the other hand, if the defendant has a right thus to carry on his trade, the court would often, by interfering, destroy that right to an extent which it could never remedy. (*Crutwell* v. *Lye*, 17 Ves. 355.)

Illustration (*d*) to the section.

The case put in Illustration (*d*) is clearly precisely the same in its nature as *Lumley* v. *Wagner*, as from the contract of personal service for a time certain, a negative stipulation that such service will, during that time, be given to no one else, is necessarily deduced; and as the cases which followed *Lumley* v. *Wagner* show, it is immaterial whether such stipulation be expressed or implied. In a recent case, one of the defendants, P, had contracted with the plaintiffs to serve them for a certain time as a master brick-maker. There was not exactly the relation of master and servant, but there was a contract for exclusive personal service. The other defendants had induced P to break his contract, and serve them instead. The main question in the case was, whether the other defendants were liable for thus procuring P to break his contract, and *Lumley* v. *Gye* (2 E. & B. 216), which had hitherto been doubted in some cases, was upheld by the court of appeal. But as against defendant P, it was held that at any rate he was liable either to an injunction with damages, or to some other amount of damages without an injunction according as the evidence at the trial might show it to be a proper case or not for an injunction. No injunction seems to have been asked for against the other defendants. (*Bowen* v. *Hall*, 6 Q. B. D. 333.)

In an analogous case, where there was an agreement between a publisher and an author, that the latter should write a tale to be published in parts for the former, and should not, during the continuance of the agreement, which was to be for over a year, write for any other publication, this last stipulation was enforced by injunction, another publisher being restrained from so employing him. (*Stiff* v. *Cassell*, 2 Jur.

N. S. 348.) The injunction is here justified on the same reasoning as in *Lumley* v. *Wagner*. The converse case, in which it has been sought, by means of an injunction, or of a decree for specific performance, to compel the employer to carry out his part of the contract, and to receive the services hired, has not unfrequently arisen. Notwithstanding some old cases the other way, it is now settled that such relief cannot be given. (*Johnson* v. *S. & B. Ry. Co.*, 3 D. M. & G. 914; *Mair* v. *Himalaya T. Co.*, L. R. 1 Eq. 411.) In the first place, such relief could not be carried out; but next, and chiefly, damages are, in such a case, an easy and adequate remedy. This is the principle acted upon in the first illustration to s. 21, cl. (*b*); and it follows that the breach of a stipulation that is merely ancillary to such a contract of personal service will not be restrained by an injunction; as, where there was a contract to employ plaintiff as broker to a company, and to advertise his name as broker. (*Brett* v. *East India & L. S. Co.*, 2 H. & M. 404.) This seems the real ground on which such a case is distinguishable from *Lumley* v. *Wagner*.

IV. The practice as to injunctions, both temporary and perpetual.

Practice should depend upon principle.

Rules of practice ought not to be purely arbitrary, but should rest upon intelligible principles, and though every court is bound to adhere to the express rules laid down by the Legislature, the application of these must be guided by a recognition of the principles on which they rest. It is, therefore, not superfluous to notice, for the guidance of our courts in India, the principles to be gathered from the cases in the analogous rules of practice prevailing in English courts of equity.

Practice relates chiefly to temporary injunctions.

The rules of procedure as to injunctions laid down in ch. xxxv of the Code of Civil Procedure are limited to temporary injunctions, and it is mainly as to this class of injunctions that questions of practice can arise. A perpetual injunction, made at the hearing, is in substance the decree, or a part of the decree in the suit, and the practice in relation to its making or execution is part of the general practice as to decrees. All the remarks that follow must therefore be taken to be limited to temporary injunctions, except when expressly stated otherwise.

Two kinds of temporary injunctions.

Temporary injunctions are of two kinds (1) those obtained *ex parte;* and (2) those obtained after notice. Interlocutory applications for injunctions may now be supported by affidavits, as provided in ch. xvi of the Code. Where the object of a suit is to obtain a perpetual

injunction, it will necessarily form part of the prayer of the plaint, and forms for such plaints are given in the 4th Schedule of the Code, in Nos. 100 to 104. A plaint must have been filed before a temporary injunction can be applied for; but it does not appear that it need have been prayed for in the plaint, and indeed the necessity for it may only have arisen subsequently. Forms of such temporary injunctions are given in the 4th Schedule, No. 166, and the form of a notice of application in No. 167. It would seem to be good practice that, though an injunction is prayed for in the plaint, the defendant ought not to plead to it, but wait till the application is made before he adduces his facts against its being granted. (*Booth* v. *Taylor*, L. R. 1 Exch. 51.)

There must be a suit.

It is a general rule that a plaintiff applying for an injunction must set forth a positive and particular title; thus, it is not enough to set out a mere hypothetical title upon the plaintiff's information and belief, that a settlement was executed, under which defendant is tenant for life, and plaintiff remainderman; nor to state generally that plaintiff is entitled in fee simple without disclosing a particular title. (*Davies* v. *Leo*, 6 Ves. 786; *Whitelegg* v. *Whitelegg*, 1 Bro. C. C. 57.) Where the title alleged by the plaintiff has been wholly or in part denied by the defendant, and then there is a motion for an injunction, a question has been raised whether the affidavits in support of the motion ought to go only to the facts of the waste or other injury, the object of the injunction, or may be also in support of the title. It would be highly inconvenient upon such a motion to discuss conflicting evidence as to title; but it would be right to require the plaintiff to produce *primâ facie* evidence of title. The facts, as to which conflicting evidence on such a motion should be confined, are those to which the relief of an injunction applies itself. Such are the danger or acts of waste, the nuisance, or other irreparable mischief or injury, the prevention of which is the object of the motion. (*Norway* v. *Rowe*, 19 Ves. 141; *Platt* v. *Button*, 19 Ves. 447.) If, after all, the plaintiff's right is doubtful, generally there will be no injunction. (*Field* v. *Jackson*, 2 Dick. 599.) In such a case there is need of much caution, and of a careful consideration of the comparative mischief or inconvenience of interfering or not interfering. (*Electric T. Co.* v. *Nott*, 2 Coop. C. C. 41.) So also, where the motion is to restrain an alleged breach of covenant, and it is doubtful whether the act be a breach or not. (*Child* v. *Douglas*, 5 D M. & G. 739.) But where the

Title to be shown.

construction of a contract is clear, and the breach is clear, it is not a question of damage, but the mere circumstance of a breach of the covenant affords a sufficient ground for an injunction; and this, whether the breach has or has not been committed, provided the defendant claims and insists on a right to do the act which would constitute such breach. (*Tipping* v. *Eckersley*, 2 K. & J. 264.)

Ground for apprehending injury must be shown.

Though a plaintiff need not wait till an anticipated injury has been committed, yet he must show some just ground for apprehending a violation of his rights. It is not enough to say that he verily believes that the defendant is about to do the act, but there must be something in act or word to indicate such an intention. (*Gibson* v. *Smith*, 2 Atk. 182; *Jackson* v. *Cator*, 5 Ves. 688; *Barry* v. *Barry*, 1 J. & W. 653; *Etches* v. *Lance*, 7 Ves. 416; *Hanson* v. *Gardiner*, *id.*, 309; *Cowley* v. *Byas*, 5 Ch. D. 944.)

When application will be premature.

So, the application must not be altogether premature; thus, where there was an existing partnership which would expire on a certain future date, and the defendant was bound not to carry on the business after that date within certain limits, and his acts indicating an intention so to do, an injunction was sought before that date, it was held to be premature, as being a suit upon the mere speculation of possible mischief, which might never happen at all, and which could not happen until a certain future period. (*Coates* v. *Coates*, 6 Mad. 287.) Such a case is very distinct from one in which the defendant has begun upon his own land works which, when carried into effect, will result in a nuisance; then an immediate application is not only allowable but proper. (*Haines* v. *Taylor*, 10 Beav. 78.)

Where the sheriff seized goods of the father in execution against the son, and the father gave him notice, and he then filed an interpleader suit, but without waiting for that the father obtained an injunction against the sheriff being in possession, it was held that the father should have waited for the interpleader and that the injunction being premature must be dissolved, the father paying his own costs. (*Hilliard* v. *Hanson*, 21 Ch. D. 69.)

Party should come quickly.

When a party applies for an injunction, and especially for one *ex parte*, he ought to come quickly upon the discovery of his rights, and without having in any manner led the opposite party to

suppose his case to be different from that which he really intends to make. In the affidavits supporting his motion, he must state his case fully, and not bring it out in portions, relying upon a new ground for relief when one previously set up has failed; and where an injunction is applied for upon a ground that fails, it will not generally be granted on another which has not, but might have been, put forward. (*Castelli* v. *Cook*, 7 Hare, 89.)

Case to be stated fully and fairly.

So the plaintiff cannot apply for an injunction in one character and then seek to have it in another; as, first as charterer of a ship, and then as managing owner of it. (*Lidgett* v. *Williams*, 4 Hare, 464.) It is no excuse for the omission, in the application, of a material circumstance, that the plaintiff swears afterwards that at the time he had forgotten it (*Clifton* v. *Robinson*, 16 Beav. 335); or that he was not aware of the importance of the facts which he has omitted to bring forward. The application *ex parte* for an injunction has been compared to an insurance transaction where *uberrima fides* is required, and where the concealment not only of a fact known to be material, but one actually so, though not known to be so, is sufficient to vitiate the policy. (*Dalglish* v. *Jarvie*, 2 M. & G. 231.) But this wholesome rule is limited to matters of fact, and is not extended to setting out any special points or provision of the law bearing upon the case. (*Atty.-Gen.* v. *Liverpool*, 1 M. & Cr. 210.) And where a material fact, charged in support of the injunction, lies specially within the knowledge of the defendant only, it is enough if the plaintiff states it, not positively, but as he has reason to know and believe it to be true, leaving it to the defendant to deny it if not true, and then his not denying it will be taken as an acknowledgment of it. (*Scott* v. *Becher*, 4 Price, 346.) A party who obtains an injunction through misrepresentation or concealment of the facts, ought to lose it; but it can hardly be contended that when an injunction is dissolved on those grounds, the party may not apply again upon the merits. (*Fitch* v. *Rochfort*, 18 L. J. 458, Ch.)

The grant of an injunction *ex parte* is the exception, and to be justified only by special circumstances. If the defendant has already appeared to the suit there is ordinarily still less reason for it; but where a defendant is in default for not appearing, more readiness would be shown where the facts otherwise justify the grant. The

Ex parte injunction, when granted.

real question always is the imminency of the mischief; thus, where the plaintiff was the owner of certain houses, and had agreed to sell them to the defendants at a price to be fixed by arbitrators, and, before the award was made, the defendants began to pull down the houses, there was an injunction *ex parte* to restrain them from so doing, although the defendants had appeared to the suit. (*Petley* v. *E. C. Ry. Co.*, 8 Sim. 483.) But the more usual practice now is to grant what is called an *interim* order, by which the defendant is restrained until a particular date, and liberty is given to plaintiff to serve notice for an injunction upon some day named. The plaintiff is not unfrequently put upon terms, on obtaining such an order, as to damages by reason of such order, or otherwise as the case may require. This kind of order would be within the terms of para. 2, s. 493, of the Code.

Interim orders.

As a general rule there can be an injunction only against a party to the suit (*Iveson* v. *Harris*, 7 Ves. 256); but there are some apparent exceptions where the person really stands in the place of a party to the suit; thus, an injunction to stay waste has been granted against a purchaser under a decree, who had not paid into court all his purchase-money (1 S. & S. 381); against a tenant let into possession under a receiver (15 Sim. 353); against a tenant who was in possession, and though not a party, was acting for the defendant (1 Dick. 68; 2 Dick. 670); and generally against persons who, though not parties, fill the character of workmen and servants of the defendant. (*Freeman* v. *Burke*, 7 Ir. Eq. R. 282.) Otherwise, though the usual form is to restrain the defendant, his agents, workmen and servants, this will not include his tenants. (*Hodson* v. *Coppard*, 7 Jur. N. S. 11.)

Against whom there may be an injunction.

Not only may an injunction be granted upon terms, as on an undertaking by the plaintiff in regard to damages but it may also be refused upon terms, as where the defendant undertakes to do certain things, as to keep an account, give security, and so on. In the case of an injunction under s. 492 of the Code, *pendente lite*, it is clear that such an order would be within the terms of the last paragraph of the section. Whether as to an injunction under s. 493 the words of paragraph 2 may be read as if they were that "the court may refuse such injunction on such terms as to keeping an account, giving security, or otherwise,

May be granted or refused upon terms.

as the court thinks fit," is not quite clear; but there is anyhow no objection to a defendant submitting to such terms, on the court offering, in that case, to keep back the injunction. Where there was a dispute between landlord and tenant as to the terms of a lease, and the landlord threatened to distrain for the rent which he alleged to be due, an injunction to restrain him was granted, but only upon the terms that the tenant should pay the rent into court within a fort-night. (*Shaw* v. *Jersey*, 4 C. P. D. 359.) The term of keeping an account is one often imposed upon a defendant in lieu of an injunction in cases of alleged infringements of patents, trade-marks, and so on.

Mandatory injunctions.

The object of a temporary injunction being almost invariably to maintain the *status in quo* until the rights of the parties can be decided at the hearing, it has been said to be a rule that a mandatory injunction will be granted only at the final hearing (*Gale* v. *Abbott*, 8 Jur. N. S. 987); but this cannot be said to be more than a general rule, for it may be essential to prevent irreparable mischief that the act done by the defendant should be at once undone. (See *Robinson* v. *Byron*, 1 Bro. C. C. 588; *Lane* v. *Newdigate*, 10 Ves. 192.)

Duration of a temporary injunction.

As to the duration of a temporary injunction, the proper form is (as shown in No. 166, Schedule 4 of the Code) "until the hearing of this cause, or until the further order of court." This form permits either party meanwhile to apply to the court under s. 496 to discharge, vary, or set aside the injunction.

Perpetual injunctions.

A perpetual injunction is granted only at the hearing, and from its nature is part of the decree, to be varied or set aside by means of an appeal in the usual course; and a right to such an injunction may be established at the hearing, though previously one had been refused or not applied for. Further, by s. 493 it may be obtained *after* as well as *before* judgment; but as in our procedure the judgment and decree in a suit are distinct processes, these words do not seem to justify an injunction *after* decree.

Notice of injunctions.

Supposing an injunction to have been granted *ex parte* or otherwise, due notice thereof must be given to the party to be affected by it. But it is sufficient to render a party liable for a breach that he has actual notice thereof. There need not be formal notice, and the defendant being in court

when the order for an injunction is made, he is bound by it from that time, and not from formal service thereof only (*Scott* v. *Becher*, 4 Price, 346); and he cannot evade such notice by turning his back and leaving the court, before the actual words are pronounced. (*James* v. *Downes*, 18 Ves. 524.) If there be actual notice, it is immaterial that the writ of injunction has not been served, or not actually issued (*Vansaudau* v. *Rose*, 2 J. & W. 264; *McNeil* v. *Garratt*, Cr. & Ph. 98). This rule is not limited to cases in which a breach has been committed *before* there has been time to get the order drawn up: it will be the same though there has been time, if the defendant knew of the order being passed. A sale of the different parts of a patent machine so that they can be easily put together by any one is a breach of an injunction to restrain the sale of such machine (*United Telephone Co.* v. *Dale*, 25 Ch. D. 778). When served it should be a personal service, and a copy of the writ ought to be delivered, the original being produced. (*Woodward* v. *King*, 2 Dick. 797.) It is now frequently the practice in urgent cases to serve this notice by electric telegraph. (*In re Bryant*, 4 Ch. D. 98; *ex parte Langley*, 13 Ch. D. 110.)

Injunction must be obeyed.

An injunction, however erroneously granted, or irregularly obtained, is still an order of the court, and must be obeyed; the proper course is to move to discharge it. (*Partington* v. *Booth*, 3 Mer. 148.)

Breach of an injunction.

It is obvious that a person who is not a party to the suit, nor has acquired any right *pendente lite* from any one as a party, cannot, by only exercising some antecedent right, be guilty of a breach of an injunction. (*Bootle* v. *Stanley*, 2 Eq. C. Abr. 285.) So, a party guilty of a breach of an injunction through mistake, or mere error of judgment, should not be committed; but will have to pay the costs of the application bringing that breach under the notice of the court; and, it would seem, also any costs of the breach. (*Newman* v. *Rigg*, 10 Jur. 463.) But if a party, who, together with others, has been restrained by injunction from doing a particular act, is afterwards present, aiding and abetting when that act is done which the injunction prohibits, he is guilty of a breach of the injunction. (*St. John's College* v. *Carter*, 4 M. & C. 497.) Where there is a perpetual injunction to restrain the continuance of a tort, as a nuisance, it is merely against the party, his servants, workmen, and agents, and cannot be said to run with the land. If he has sold the property to somebody else, the injunction

does not affect the new owner; for in such a case the new owner or purchaser is not liable to the former decree. If he continues the nuisance, or commits a fresh one, an action may be brought against him, and that is all; he has nothing to do with the former proceedings. (*Atty.-Gen.* v. *B. T. and R. D. B.*, 17 Ch. D. 692.)

Enforcing an injunction.

The enforcing of any kind of injunction is provided for by the 3rd and 4th paragraphs of s. 493 of the Code, whereby the defendant may be imprisoned for a term of six months, or his property attached, or both. As such process is of a *quasi*-criminal nature, personal service of a notice of motion to commit for breach of an injunction ought to be made indispensable. (*Ellerton* v. *Thirsk*, 1 J. & W. 376.) Where the injunction is to compel the defendant to do anything, the proper course would be to move that he be ordered to do it by a particular day, or stand committed. (*Angerstein* v. *Hunt*, 6 Ves. 488.) Besides the formal evidence of service, the plaintiff will have to establish the facts upon which he relies as constituting a breach, and the defendant, of course, may meet such facts by other evidence.

Dissolving an injunction.

Where a defendant moves to dissolve an injunction under s. 496 of the Code, the practice is to grant an order that the motion shall stand to be heard on a date certain, notice thereof being duly served upon the plaintiff or his authorized agent. It has been held that where a plaintiff, upon an application for an *ex parte* injunction, suppresses material facts, the injunction will be dissolved on that ground alone, and he will not be allowed on the motion to dissolve, to maintain it on the merits then disclosed. (*Hilton* v. *Granville*, 4 Beav. 130; *Hemphill* v. *McKenna*, 3 D. & W. 183; *Belfield* v. *Jones*, 25 L. T. 78, Ch.) The vagueness or ambiguity of the terms of the injunction may be a ground on which to dissolve it; as where under any construction of the order the defendant may be prejudicially affected; or where the defendants were restrained in general terms from acting otherwise than in accordance with certain Acts. (*Dalglish* v. *Jarvie*, 2 M. & G. 231; *Dover* v. *L. C., &c., Ry. Co.*, 7 Jur. N. S. 453.) The dismissal of a suit dissolves the injunction as of course. (*Green* v. *Pulsford*, 2 Beav. 70.) On a motion to dissolve an injunction, the defendant may rely on an objection, although it would have been a ground of demurring to the plaint. (*Hudson* v. *Maddison*, 12 Sim. 416.) A motion to dissolve should be decided upon the merits, the plaintiff being allowed to give

evidence to meet that of the defendant, but the hearing of the motion once fairly opened, it should be heard through on the evidence then before the court. (*Electric T. Co.* v. *Nott*, 11 Jur. 273.)

Compensation for issue of an injunction.

Section 497 of the Code contains a very useful provision for awarding compensation to a defendant where an injunction has been granted upon an application based on insufficient grounds, or in the course of a suit instituted without probable ground. The defendant, it must be observed, must move the court to make the award; it is in the discretion of the defendant to apply or not, but the amount to be awarded is (within certain limits) in the discretion of the court; and the defendant, having once set the court in motion, will be concluded by its award.* As the language of the section is disjunctive, it would seem that the defendant need not wait till the final judgment of the court, but might move the court to award him compensation on a motion to dissolve the injunction before the hearing, and further that on such a motion, the court might award compensation, though, at the hearing, the judgment of the court may not be entirely adverse to the claim of the plaintiff.

Much the same result was attained by the courts in England where the practice was invented, at first in *ex parte* injunctions of the plaintiff making an undertaking with the court to be liable to defendant for damages by the grant of the injunction. There the defendant may apply for an enquiry as to damages under the undertaking on the injunction being dissolved, either at once or at the trial, and the rule is that anyhow there ought not to be delay in making the application. Judges have, in England, differed as to whether, when an interlocutory injunction has been wrongly granted, owing to a mistake of law by the Judge without any misrepresentation or suppression or other default of the plaintiff, damages can be given at all. The damages must not be trivial or too remote, but must be "the immediate natural consequences of the injunction, under the circumstances which were within the knowledge of the party obtaining the injunction." (*Smith* v. *Day*, 21 Ch. D. 421.) In *Griffith* v. *Blake* (27 Ch. D. 474) the *dictum* in *Smith* v. *Day* that there will be no damages unless there has been misrepresentation or other like fault was dissented from. It was stated that when the undertaking for damages is general, compensation must be given to the defendant who has suffered by an injunction wrongly granted, though there was no misrepresentation or fault.

But this would apparently be otherwise where the grant of the injunction was due to a mistake of law on the part of the court. Unexplained and unreasonable delay in making the application, as a delay of four years, where the application was against a receiver in bankruptcy, though not discharged, will be sufficient grounds for refusing it, as it is a matter subject to the discretion of the court (*Hall, ex parte*, 23 Ch. D. 644.)

Appeal in respect to injunction.

Lastly, an appeal lies by the general s. 588, sub-section (24) of the Code, from any order made under ss. 492, 493, 496 and 497. In the case of a refusal to grant an injunction, the plaintiff would thus be enabled to appeal at once to the higher court, and in England this has been done, and the matter decided on the same day. (*Anwyl* v. *Jones*, 22 L. J. 995, Ch.) It seems also to be the practice in England that after a refusal of an injunction by a lower court, the plaintiff may treat his application to the higher court as a fresh motion, and adduce fresh evidence in support of it; and it has been held to be clear law, that upon a motion by a defendant by way of appeal from an order granting an injunction, the respondent (the plaintiff) may adduce fresh evidence in support of the injunction. (*Pole* v. *Joel*, 2 D. & J. 285.) It has been held in England that where an injunction has, during litigation, been granted to restrain the dealing with, or alienation of property pending it, and there is then a decision against the party who obtained the injunction, the court may continue the injunction where the party is *bonâ fide* proceeding to appeal against the decision. In such a case the danger of loss ought to be great, as where there is a fund which may be lost during the appeal; and much discretion must be used, as a party having once obtained an injunction is not therefore to keep the injunction going as long as he can keep the litigation going. The principle acted on is, that when there is an appeal about to be prosecuted, the litigation is to be considered as not at an end, and that being so, if there is a reasonable ground of appeal, and if not making the order to stay the execution of the decree, or the distribution of the fund would make the appeal nugatory, that is to say, would deprive the appellant, if successful, of the results of the appeal, then it is the duty of the court to interfere and suspend the right of the party who, so far as the litigation has gone, has established his rights. This applies just as much to the case where the action has been dismissed, as to the case where a decree has been made

establishing the plaintiff's title. (*Polini* v. *Gray*, 12 Ch. D. 438.) The form used in this case was, in dismissing the suit, to order the continuation of the injunction, with liberty to the defendants to apply to discharge such order if the appeal was not proceeded with without delay. The injunction had been made under a rule very similar in terms to s. 492 of the Code; and in our courts in India, if the successful party in the litigation is under the necessity of applying for execution, then s. 546 of the Code will afford the needed protection; but in a case within s. 492 the terms of that section seem wide enough, and in a case within s. 493 the provision that there may be an injunction after judgment would seem to suffice, to justify the continuation of the injunction being ordered in the decree. But it must not be supposed that such an order is to be by any means of course, or one that ought to be made except under very special or peculiar circumstances; but when those special and peculiar circumstances do exist, the jurisdiction ought to be exercised. (*Polini* v. *Gray*, 12 Ch. D. 445.)

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